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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., GORDON E. ALLEN, ALFRED J. HEDDEN, PETER R. KELLOGG, GILBERT G. ROESSNER, and MARSHALL M. CRISER,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Section 212(k) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(k) ("Section 1821(k)"), explicitly provides that an officer or director of an "insured depository institution" -- defined elsewhere in FIRREA as "*any* bank or savings association" (emphasis added), whether federally or state chartered, the deposits of which are insured by the Federal Deposit Insurance Corporation (the "FDIC") -- may be held personally liable for "gross negligence," or any similar or greater breach of a duty of care, as such terms are defined under state law. The questions presented for review are:

1. Whether Section 1821(k) supplants "federal common law" and constitutes the exclusive standard of liability in a civil damage action brought by the Resolution Trust Corporation (the "RTC") against the former officers and directors of a failed federally chartered FDIC insured savings bank. (As explained herein, literally dozens of such actions are presently pending throughout the United States, and many more may be brought in the future.)

2. Whether the court of appeals erred in concluding that Section 1821(k) -- a *federal* statute expressly made applicable to actions against officers or directors of "*any*" FDIC insured bank or savings association, without regard to where it is chartered -- has *no* application whatsoever to RTC actions against officers and directors of failed *federally* chartered FDIC insured institutions, and that the liability of officers and directors of such institutions is instead governed exclusively by "federal common law."

As shown below, the decision of the court of appeals is in irreconcilable conflict with (i) the plain language of Section 1821(k), (ii) the conclusion of each of the other four circuit courts of appeals that have addressed this same question, and (iii) this Court's well-established prior rulings concerning the creation and application of "federal common law," including especially this Court's recent decision in *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048 (1994), which

explicitly cites Section 1821(k) as one of several "provisions of FIRREA which *specifically create special federal rules of decision . . .*" and thus supplant federal common law. 114 S.Ct. at 2054 (emphasis added).

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were petitioners John W. Atherton, Jr., Gordon E. Allen, Alfred J. Hedden, Peter R. Kellogg, Gilbert G. Roessner, and Marshall M. Criser; respondent Resolution Trust Corporation in its capacity as receiver for City Savings, F.S.B.; CityFed Financial Corp., the parent holding company of City Federal Savings Bank, a predecessor of City Savings, F.S.B.; Victor A. Pelson and John Kean, Jr., defendants-appellees below who have since entered into settlement agreements with respondent Resolution Trust Corporation and have been (or, in the case of Mr. Kean, is expected soon to be) dismissed from this action; and George E. Mikula, James P. McTernan, Richard E. Simmons and K. Michael DeFreytas, defendants-appellees below who continue to be parties to this action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John W. Atherton, Jr., Gordon E. Allen, Alfred J. Hedden, Peter R. Kellogg, Gilbert G. Roessner, and Marshall M. Criser respectfully request that a writ of certiorari issue to review the judgment of a divided panel of the United States Court of Appeals for the Third Circuit in this action issued on June 23, 1995, and that such judgment be summarily reversed.

OPINION BELOW

Review is sought of a decision of a divided panel of the United States Court of Appeals for the Third Circuit (Mansmann, J., dissenting in relevant part), issued on June 23, 1995. The opinion is reported under the caption *Resolution Trust Corporation v. CityFed Financial Corporation*, 57 F.3d 1231 (3d Cir. 1995). Copies of the opinion, judgment and order denying rehearing *en banc* are attached as an Appendix to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was filed on June 23, 1995. Petitioners timely filed a petition for rehearing with request for rehearing *en banc*, which was denied on September 14, 1995. The judgment of the court of appeals was issued on September 22, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves section 212(k) of FIRREA, 12 U.S.C. § 1821(k), referred to herein as "Section 1821(k)". That section provides:

> Liability of directors and officers.
>
> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the [Federal Deposit Insurance] Corporation,[1] which action is prosecuted wholly or partially for the benefit of the Corporation--

[1] Pursuant to section 212(d) of FIRREA, 12 U.S.C. § 1821(d), the RTC in its capacity as receiver is given the same enforcement powers as the FDIC, including the power to bring civil damage actions pursuant to Section 1821(k).

> (1) acting as conservator or receiver of such institution,
>
> (2) acting based upon a suit, claim. or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or
>
> (3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 13,
>
> for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

STATEMENT OF THE CASE

This case involves a claim for civil money damages brought by the RTC against former officers and directors of City Federal Savings Bank ("City Federal"), a federally chartered, federally insured savings bank that was located in Bedminster, New Jersey, prior to its seizure in December 1989. At that time, the Office of Thrift Supervision declared City Federal insolvent, ordered it closed and appointed the RTC as City Federal's receiver.

The RTC, in its capacity as receiver[2], instituted the current action against former City Federal officers and directors in

[2] Through a series of transfers effectuated by the Office of Thrift Supervision, City Federal's assets, including its claims in this action, were ultimately transferred to the newly created entity named in the caption of this

(Footnote continued)

1993. The RTC alleges that the former officers and directors are liable for breaching their duty of care in connection with losses suffered by City Federal on three real estate acquisition, development and construction loans made by the institution in the mid-1980s. The loans defaulted in 1988 and 1989, during the nationwide collapse of the commercial real estate market.

Significantly, the RTC does not assert that any of the defendants engaged in any fraud, self dealing, conflict of interest, unjust enrichment or other breach of their duty of loyalty. Rather, the RTC claims only that the defendants failed to properly discharge their duty of care as officers and directors of City Federal in connection with their consideration, approval and oversight of the three loans that are the subject of this action.

In its original complaint, filed in April 1993, and its first amended complaint filed two months later, the RTC alleged, in a single count, claims for negligence, gross negligence and breach of fiduciary duty under both state and federal common law. Neither pleading asserted any claim against the former officers and directors predicated on the statutory standard of liability contained in Section 1821(k).

Petitioners, defendants below, moved to dismiss the RTC's first amended complaint, contending that Section 1821(k) established gross negligence as the exclusive standard of care in suits against officers and directors of federally chartered financial institutions. The RTC conceded (and the district court held) that state law was not applicable in this case, since City Federal was a federally chartered institution. The RTC argued, however, that despite the clear gross negligence standard set forth in the text of Section 1821(k), the "savings clause" contained in the last sentence of the statute preserved its right to proceed against the officers and directors under

case, City Savings, F.S.B., for which the RTC was also appointed receiver and on behalf of which it purports to bring this action.

"federal common law," which it has asserted establishes an "ordinary" or "simple" negligence standard of liability.

On November 15, 1993, the district court granted the Petitioners' motion and dismissed the RTC's complaint to the extent it alleged claims based other than upon Section 1821(k). (A-58 *et seq.*[3]) The district court held that Section 1821(k) established a uniform federal gross negligence standard of care in cases involving federally chartered institutions and supplanted any claims under federal common law. (A-62-64)

The RTC then filed a second amended complaint, which asserted claims against the former officers and directors based solely on Section 1821(k). The RTC also moved to certify the standard of care issue for immediate appeal to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. § 1292(b). The district court granted the RTC's motion (A-65) and, on May 18, 1994, the court of appeals granted the RTC's request for permission to appeal (A-68).

On June 23, 1995, a divided panel of the court of appeals reversed the district court. *Resolution Trust Corp. v. CityFed Fin. Corp.*, 57 F.3d 1231 (3d Cir. 1995), A-1 *et seq.* The majority stated:

> We hold that Congress [in enacting Section 1821(k)] did not . . . supplant federal common law holding directors and officers liable for conduct less culpable than gross negligence. Accordingly, . . . we will reverse the district court's order and direct the court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law.

57 F.3d at 1249, A-37. But the majority went even further, stating:

[3] The citation "A-__" refers to pages of the Appendix annexed hereto.

> Given our conclusion that Congress did not intend § 1821(k) to apply to federally-chartered depository institutions, the RTC *cannot* proceed under § 1821(k) in the City Federal action.

Id. at 1249 n.17, A-37 (emphasis in original).

The majority concluded that, notwithstanding the plain language of Section 1821(k), which clearly makes the statute applicable to actions against former officers and directors of federally chartered institutions such as City Federal, Congress had intended, when it adopted the statute, to do no more than preempt certain so-called "insulating" statutes that had been enacted by various states in recent years and which established a higher standard of care than gross negligence for officers and directors of companies incorporated in those states. Accordingly, the Third Circuit held that Section 1821(k) had no application whatsoever to federally chartered institutions, leaving a void which, the court held, was to be filled exclusively by "federal common law."

In a forceful dissent, Circuit Judge Mansmann argued that the majority's conclusion conflicted with the plain language of Section 1821(k), which, by its clear terms, applies to *all* "insured depository institutions," a term defined to include *any* institution, whether federally or state chartered, insured by the FDIC. 57 F.3d at 1251, A-40 (citing 18 U.S.C. § 1813(c)(2)). Judge Mansmann concluded that Section 1821(k) did indeed supplant federal common law, emphasizing that her analysis was guided by what she termed the "vastly different tests" that this Court has established for deciding whether a federal statute supplants federal common law, on the one hand, or preempts state law, on the other. *Id.* at 1249-50, A-38-39.

Citing this Court's decision in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), Judge Mansmann stated that, when the question is whether federal statutory or federal common law governs, it is for Congress, and not the courts, to articulate the applicable standard, with federal common law to be developed and used only as a "necessary expedient" in the absence

of a federal statute. 57 F.3d. at 1250, A-39 (citing *City of Milwaukee*, 451 U.S. at 313-17). Because she concluded that Congress, when it enacted Section 1821(k), "spoke directly" to the issue of the standard of liability applicable in cases such as this (57 F.3d at 1252, A-44), she stated that she would have held, as the Fifth, Sixth, Seventh and Tenth Circuits had previously held, that Section 1821(k) supplanted federal common law and provided the exclusive source of law in this case.

In arriving at her conclusion, Judge Mansmann strongly disputed the majority's assertion that the purpose of Section 1821(k) was solely to preempt the so-called state insulating statutes. She noted that the statute's legislative history makes clear that Congress also "understood the importance of attracting qualified persons to serve as officers and directors of financial institutions," and that Congress intended, in selecting gross negligence as the applicable standard under Section 1821(k), to choose a threshold of liability that was not so low as to discourage such qualified individuals from doing so. 57 F.3d at 1253, A-45. She pointed out that the Senate's initial draft of Section 1821(k) would have permitted the RTC to bring claims "for any cause of action available at common law, including but not limited to negligence, gross negligence, willful misconduct. . .," but that the amended version of the bill "removed, *inter alia*, all references to a simple negligence standard." 57 F.3d at 1253, A-45-46. In addition, she noted that, after Section 1821(k)'s enactment, there were two unsuccessful attempts to amend the statute to include a simple negligence standard of liability. 57 F.3d at 1254, A-48-49. These and other factors led Judge Mansmann to conclude that Congress had indeed intended to supplant federal common law and to set gross negligence as the governing standard in Section 1821(k).

Following the court of appeals's decision, Petitioners sought rehearing, with a suggestion of rehearing *en banc*. This request was supported by an *amicus curiae* brief filed by the American Bankers Association, America's Community Banks, the Association of Bank Holding Companies and the Independent Bankers Association of America, which emphaized,

among other things, the adverse impact that the majority's decision would have on the ability of their member institutions to attract the best qualified managers. The court of appeals denied the petition for rehearing on September 14, 1995. (A-54-56)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this action for four reasons:

First, the Third Circuit's decision flies in the face of the plain language of Section 1821(k) and violates well-established rules of statutory construction. Section 1821(k) is a federal statute that, by its very terms, applies to *all* "insured depository institutions," a term defined in FIRREA to include federally chartered institutions such as City Federal. To hold, as the court of appeals did, that Section 1821(k) has *no* application whatsoever to federally chartered institutions constitutes a wholly inappropriate act of judicial lawmaking that frustrates the design of Congress in enacting that statute. (*See* Point I, *infra*)

Second, as noted by the dissenting judge below, the majority's conclusion that "federal common law," instead of Section 1821(k), supplies the applicable law in this case violates this Court's longstanding rules respecting the creation and application of such judge-made law set forth in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and reiterated only recently in *O'Melveny & Myers v. FDIC*, __ U.S. __, 114 S. Ct. 2048 (1994). Those decisions make clear that "'[t]here is no federal general common law,'" (*O'Melveny & Myers*, 114 S.Ct. at 2053, quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); that federal common law exists solely as a "necessary expedient" to be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute; and that when Congress has "spoken" to an issue -- as it plainly has in Section 1821(k) -- Congress's statutory enactment prevails and supplants any judge-made federal common law (*City of Milwaukee*, 451 U.S. at 313-15). Indeed, in *O'Melveny & Myers*, this Court severely restricted the creation and use of

federal common law in cases instituted by the RTC and FDIC, and explicitly identified Section 1821(k) as one of a number of provisions in FIRREA "which specifically create special federal rules of decision" and thus leave no room for the operation of federal common law. 114 S.Ct. at 2054. Nevertheless, the Third Circuit simply ignored the teaching of *O'Melveny & Myers* in reaching its decision below. (*See* Point II, *infra*)

Third, the decision below is in irreconcilable conflict with the decisions of the Fifth, Sixth, Seventh and Tenth Circuits, each of which has concluded -- consistent with *City of Milwaukee* and *O'Melveny & Myers* -- that Section 1821(k) supplants federal common law and establishes gross negligence as the exclusive standard of liability in RTC and FDIC actions against former officers and directors of federally chartered depository institutions. *See Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993); *Resolution Trust Corp. v. Frates*, 52 F.3d 295 (10th Cir. 1995). (*See* Point III, *infra*)

Finally, this case presents an issue of immense importance, which will have a direct impact on a large proportion of the more than one hundred presently pending actions brought by the RTC against officers and directors of failed financial institutions. *See* Resolution Trust Corp., Division of Legal Services, Professional Liability Section, *Semiannual Report, April 1, 1995 Through September 30, 1995*, (1995). These actions will continue to be prosecuted by the FDIC, which will assume the RTC's responsibilities and caseload when the latter agency ceases to exist at the end of 1995. *Id.* at 2. In addition, the decision in this case will dramatically affect any current and future litigation brought against officers and directors by the FDIC. It is no exaggeration to say that the resolution of the standard of care issue raised in this case is being watched closely by experienced and thoughtful businesspersons throughout the United States, as well as by our nation's financial institutions, since its outcome will affect both the willingness of the former to serve as officers and directors of

such enterprises, and the ability of the latter to attract competent management -- a key concern of Congress when it enacted Section 1821(k). *See, e.g.*, 135 Cong. Rec. S4276-77 (daily ed. April 19, 1989); *Gallagher*, 10 F.3d at 422; *CityFed*, 57 F.3d at 1253, A-45 (Mansmann, J., dissenting). Indeed, this issue is so significant, and the Third Circuit's decision below is so clearly at odds with settled law, that Petitioners submit that this Court should not only grant the requested writ of certiorari, but should summarily reverse the decision below pursuant to this Court's Rule 16.1. *(See* Point IV, *infra)*

I

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE PLAIN LANGUAGE OF SECTION 1821(k) AND VIOLATES WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION

The Third Circuit held that Section 1821(k) -- a *federal* statute that governs the liability of officers and directors of all *federally* insured depository institutions -- applies only to *state* chartered institutions, and has *no* applicability whatsoever to *federally* chartered institutions, even though the plain language of Section 1821(k) makes no such distinction. This is not an insignificant error in statutory construction; it eviscerates Section 1821(k), frustrates Congress's design and has broad implications for the interpretation of other sections of FIRREA.

Section 1821(k) provides that "[a] director or officer of an *insured depository institution* may be held personally liable for money damages in any civil action by [the RTC] . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care. . . ." (Emphasis added) As pointed out in the dissent below (57 F.3d at 1250, A-39-40), the term "insured depository institution" is defined in FIRREA as "*any* bank or savings association the deposits of which are insured by the [FDIC]. . . ." 12 U.S.C. § 1813(c)(2) (emphasis added). No distinction whatsoever is made between state chartered and federally chartered institutions.

Significantly, the subsections immediately following the definition of an "insured depository institution" contain separate definitions for "federal depository institution" and "state depository institution." 12 U.S.C. §§ 1813(c)(4) and (c)(5) provide:

> (4) Federal depository institution. The term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.
>
> (5) State depository institution. The term "State depository institution" means any State bank, any State savings association, and any insured branch which is not a Federal branch.

12 U.S.C. §§ 1813(c)(4) and (c)(5). Clearly, if Congress had intended Section 1821(k) to apply only to state chartered institutions, as the majority below concluded, Congress could have simply used the term "State depository institution" in Section 1821(k) instead of "insured depository institution," a term that makes no distinction between the chartering authorities.

Congress did not do so, opting instead for the broader, more inclusive term "insured depository institution." Yet, despite the plain language of Section 1821(k), the court of appeals determined, based on its reading of the statute's legislative history, that it applied only to state chartered institutions. In so holding, the court of appeals quite literally read Section 1821(k) out of the United States Code, at least insofar as thousands of federally chartered institutions are concerned.

Moreover, as explained in the dissent below (57 F.3d 1249-50, A-38-39) and as shown in Point II, *infra*, the court of appeals compounded this error by determining that "federal common law," and not Section 1821(k), supplied the standard of liability for officers and directors of federally chartered institutions. In so holding, the majority below violated well-settled principles relating to the use of such judge-made law.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), this Court made clear that "[t]here is no federal general common law." Later, in *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981), the Court explained that federal common law is simply a "'necessary expedient'" that should be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute. Such judge-made law, this Court held, is "'subject to the paramount authority of Congress.'" *Id.* at 313 (citations omitted). Thus, when Congress "speak[s] directly" to a question -- as it has plainly done in this case -- federal common law is supplanted by Congress's enactment; it is not necessary for Congress to "affirmatively proscribe" the federal common law [illegible] in order to abrogate its application. *Id.* at 315.

The Third Circuit majority committed such manifest error in this case because, from the outset, it adopted a fundamentally flawed approach to statutory construction. Faced with the identical task of interpreting the meaning of Section 1821(k), the courts of appeals for the Fifth, Sixth, and Seventh Circuits began their analyses by examining the actual statutory language contained in that provision. *RTC v. Miramon*, 22 F.3d 1357, 1360-61 (5th Cir. 1994); *FDIC v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416, 419-420 (7th Cir. 1993). This is the accepted approach to statutory construction, and the only mode of analysis consistent with prior decisions of this Court. The interpretation of a statute must begin with its literal language, and not with its legislative history. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

While paying lip service to this accepted practice (57 F.3d at 1237, A-13), the majority below did not follow it and thereby did violence to the statute. Rather than examining the plain language of Section 1821(k) in its entirety, the majority turned immediately to, and focused exclusively on, the "savings clause" contained in the very last sentence of the statute. *Id.* No consideration was given at all to the more extensive substantive portion of the law preceding the savings clause. This substantive language is broad and inclusive; it not only articulates the

gross negligence standard, but makes clear that it applies to "any" civil action by the FDIC or RTC, regardless of the capacity in which they are proceeding or the manner in which they obtained the claim being pursued. There is not the slightest indication in this language that Congress sought to create or single out for separate treatment a special category of claims against officers and directors of *federally* chartered institutions.

However, ignoring Section 1821(k)'s plain language, the majority simply announced its agreement with the RTC's broad, statute-swallowing interpretation of the savings clause as manifesting Congressional "intent" to preserve federal common law in such cases. 57 F.3d at 1237, A-13. In so holding, the majority violated the well-established rule of statutory construction that a savings clause cannot be allowed to supersede a specific substantive provision. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

The majority further asserted that Congress could not possibly have "intended" any other meaning for the savings clause. 57 F.3d at 1238, A-14. This preoccupation with Congress's "intent," instead of the literal language of the statute, was clear error. In effect, the majority first read the legislative history to determine what it believed Congress "must" have meant, and then tortured the language of the statute to fit within that construction. In the process, the majority read the gross negligence standard out of the statute with respect to federally chartered institutions, even though Congress gave no hint whatsoever that it sought to achieve such a strange result.

A court may be entitled to depart from the literal language of a statute on rare occasions when confronted with unambiguous legislative history to the contrary. *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 835. However, the legislative history does not justify that extraordinary practice in this case. Indeed, each of the other courts of appeals to have considered this issue (and the dissenting judge below) concluded that the legislative history clearly supported a very different view of the purpose of Section 1821(k) from the one adopted by the

Third Circuit. *Bates*, 42 F.3d at 372-73; *Miramon*, 22 F.3d at 1362-63; *Gallagher*, 10 F.3d 421-22; *CityFed*, 57 F.3d at 1252-53, A-44-49 (Mansmann, J., dissenting).

The court of appeals, in the decision below, assumes that Congress in enacting Section 1821(k) was simply seeking to impose maximum liability on officers and directors of failed depository institutions -- "to place a floor, not a ceiling," on the liability of such individuals. 57 F.3d at 1238-39, A-15. From that assumption, it comes to the conclusion that Congress cannot have intended Section 1821(k) to mean what it says. However, even a cursory examination of the legislative history underlying Section 1821(k) shows that the Third Circuit misread Congress's purpose.

The legislative history of Section 1821(k) shows that Congress sought to balance *two* competing considerations. On the one hand, as the majority below notes, Congress sought to relieve the RTC and FDIC from the effects of certain so-called "insulating" statutes passed by various states that required proof of intentional violations of the duty of care in order to recover civil money damages from officers and directors of corporations incorporated in those states. At the same time, however, Congress also sought to achieve another objective -- it wished to avoid setting the liability threshold so low that well qualified and experienced businesspersons would be discouraged from serving as officers and directors of the thousands of depository institutions throughout the United States. *See Bates*, 42 F.3d at 372-73; *Miramon*, 22 F.3d at 1362-63; *Gallagher*, 10 F.3d 421-22; *CityFed*, 57 F.3d at 1252-53, A-45 (Mansmann, J., dissenting).

Congress, in its wisdom, decided that the proper balance between these two competing objectives was the gross negligence standard which appears in Section 1821(k). *Id.*[4] This decision was hardly surprising, since it struck the balance at exactly the same point as the leading state law jurisdiction, whose rulings have been followed in numerous other states as well. *See Aronson v. Lewis*, 473 A.2d 805, 812-13 (Del. 1984) (holding that, under the business judgment rule as applied in Delaware, the standard of liability for corporate officers and directors is effectively gross negligence); *Matter of Prudential Ins. Co. Derivative Litig.*, 282 N.J. Super. 256, 275, 659 A.2d 961, 970 (N.J. Ch. 1995)(following *Aronson*); *Katz v. Chevron Corp.*, 22 Cal. App. 4th 1352, 1367, 27 Cal. Rptr. 2d 681, 689 (1994)(same); *Brane v. Roth*, 590 N.E.2d 587, 591 (Ind. App. 1992)(same); *Yost v. Early*, 87 Md. App. 364, 377, 589 A.2d 1291, 1298 (Md. Ct. Spec. App. 1991) (same).

The Third Circuit, however, has decided that Congress's balancing of these two competing concerns was improper. It has, in effect, overruled Congress's decision and, by judicial legislation, has replaced that decision with a test of its own which it believes strikes a better balance between these two interests. This is manifestly improper as a matter of law; moreover, as a practical matter it will surely discourage qualified businesspersons from serving as officers and directors of depository institutions, which is exactly the result that Congress sought to avoid.

Furthermore, the decision below, if allowed to stand, may well have a far-reaching effect on the interpretation of other sections of FIRREA. Several sections of FIRREA, like Section 1821(k), are made broadly applicable to "insured depository institutions." Following the decision below, courts could limit the application of these sections only to state chartered institutions. For example, the section of FIRREA involving the applicable statute of limitations, 12 U.S.C. § 1821(d)(14), which is applicable to "insured depository institutions," may now be interpreted to apply only to state chartered institutions. The same is true of other sections of FIRREA. *See, e.g.*,

[4] Indeed, as noted in the dissent (57 F.3d at 1253, A-45-46), the original Senate version of Section 1821(k) would have permitted suits for simple negligence, but the bill was amended to delete this provision. Moreover, after FIRREA became law, two attempts were made to change Section 1821(k) to authorize suits for simple negligence, and both were unsuccessful. 57 F.3d at 1253, A-48.

12 U.S.C. § 1821(d)(13)(the judicial exclusion section); 12 U.S.C. § 1821(e)(3)(the section on repudiation of contracts by the agency receiver); 12 U.S.C. § 1821(d)(2)(A)(i)(the section providing that the agency succeeds to "all rights, titles, powers, and privileges of the insured depository institution. . . .").

In sum, the decision below creates a square and irreconcilable conflict with the very language of the statute itself. It eviscerates Section 1821(k), frustrates Congress's design in enacting it and has broad implications within the entirety of FIRREA. For these reasons the decision should be reviewed and reversed.

II

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S PRIOR RULINGS RESPECTING THE APPLICATION OF "FEDERAL COMMON LAW," AND PARTICULARLY ITS RECENT DECISION IN *O'MELVENY & MYERS v. FDIC*

This Court has long made clear that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See also O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048, 2053 (1994) (citing *Erie*); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"). Instead, in determining whether federal statutory or common law will apply to a particular case, courts must "'start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee*, 451 U.S. at 317 (footnote omitted). Federal common law exists solely as a "'necessary expedient'", to be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute; moreover, in those few cases where it exists, federal common law is nonetheless "'subject to the paramount authority of Congress,'" and "when

Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 313-14.

Although a federal statute will not invade well established principles of common law[5] unless a statutory purpose to the contrary is present, *United States v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 1631, 1634 (1993), where Congress "speaks directly" to the question addressed by federal common law, such law is supplanted. *Id.*; *City of Milwaukee*, 451 U.S. at 315. Moreover, it is not necessary for Congress to "affirmatively proscribe" the federal common law rule in order to abrogate its application. *Id.*

The only reading of Section 1821(k) consistent with its plain meaning and its legislative history is that the statute "speaks directly" to the standard of liability applicable to the directors and officers of federally chartered, federally insured depository institutions in RTC and FDIC actions. This has been the conclusion of every other court of appeals that has addressed this issue. *See Frates*, 52 F.3d at 297; *Bates*, 42 F.3d at 373; *Miramon*, 22 F.3d at 1360; *Gallagher*, 10 F.3d at 424-25. *See also CityFed*, 57 F.3d at 1250, 1252, A-39-40, 44 (Mansmann, J., dissenting). Indeed, as the Court of Appeals for the Fifth Circuit stated: "It is difficult to conceive how congress could more clearly 'speak directly' to the issue of the standard of care for personal liability of directors and officers of federally-insured depository institutions." *Miramon*, 22 F.3d at 1361.

Only last term, in *O'Melveny & Myers*, this Court prohibited the creation and use of federal common law in a damage action brought against the former lawyers for a failed savings

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[5] As the majority below effectively acknowledged (57 F.3 at 1247 n.16, A-32 n.16), the "federal common law" of officer and director liability, to the extent it exists, is anything but "well established."

bank by the FDIC in its capacity as receiver for the institution. This Court emphasized that, in determining the appropriate rule of decision in such a case:

> we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed. . . .

114 S.Ct. at 2054. Yet the Third Circuit majority did exactly that in concluding that Section 1821(k), an explicit federal statute, enacted by Congress as part of a comprehensive federal legislative scheme (FIRREA), had no application whatsoever in the case of federally insured, federally chartered, depository institutions.

In addition, in *O'Melveny & Myers* this Court specifically identified Section 1821(k) as one of several provisions of FIRREA that created "special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." 114 S.Ct. at 2054. The Court rejected the argument that such provisions could somehow be viewed as "non-exclusive" grants of rights that were capable of being "supplemented or modified by federal common law," as well as the argument relied on by the majority below (57 F. 3d at 1248, A-34) that the strong federal interest in recovering money from those whose actions may have caused losses to financial institutions afforded the courts the right to amplify such specific Congressional grants of authority by creating a parallel federal common law. *Id.* To annex such additional federal common law rules to FIRREA, the Court stated, "is not to 'supplement' this scheme, but to alter it." *O'Melveny & Myers*, 114 S.Ct. at 2054.

Despite all of this, and even though the Third Circuit majority was well aware of this Court's decision in *O'Melveny & Myers* -- and in fact cited the decision in its opinion (*see* 57 F.3d at 1235, 1245, A-9, 28) -- it inexplicably ignored the decision's teaching. The majority opinion contradicts an explicit federal statutory provision -- Section 1821(k) -- making

it inapplicable to any federally chartered institution, notwithstanding the clear language of the statute making it applicable to all "insured depository institutions," and impermissibly falls back on judge-made "federal common law" to fill the void thus created. The Third Circuit did not simply create additional federal common law to supplement FIRREA, as the Ninth Circuit did in *O'Melveny & Myers*. Rather, it held that the very subject addressed by Section 1821(k) -- the liability of officers and directors of insured depository institutions -- was to be governed *exclusively* by federal common law where the institution was federally chartered, even though the statute itself recognizes no such distinction. Such reliance on judge-made federal common law is impermissible because it disregards the preeminent role of Congress in designating what constitutes federal law, and is flatly at odds with *O'Melveny & Myers*.[6]

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[6] The majority decision below appears to suggest that there may in fact be a body of "federal common law" applicable to the alleged liability of officers and directors of federally insured depository institutions. This is by no means clear. The majority cites to this Court's decision in *Briggs v. Spaulding*, 141 U.S. 132 (1891), as a possible source of federal common law. 57 F.3d at 1247, n.16, A-32 n. 16. *Briggs*, however, was decided during the era of *Swift v. Tyson*, 41 U.S. 1 (1842), nearly half a century before this Court's decision in *Erie*. *Briggs* has been cited by this Court only once since *Erie*, and that was in a footnote in a dissenting opinion. *See Bangor Punta Oper. Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 721 n. 1 (1974) (Marshall, J., dissenting).

Moreover, to the extent that there did exist, prior to FIRREA, a federal common law of officer and director liability, Petitioners believe it is clear that the applicable standard of liability thereunder is gross negligence or the equivalent thereof, and not any lesser standard. *See* Ronald W. Stevens & Bruce H. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether Section 1821(k) Preempts Federal Common Law*, 13 ANN. REV. BANKING L. 169 (1994). Accordingly, there is no basis for the majority's assertion -- which apparently was central to its holding -- that reading Section 1821(k) as supplanting federal common law would create differing standards of liability for officers and directors of federally chartered institutions, either pre- or post-FIRREA or before and after a

(Footnote continued)

Since even in the best of circumstances, federal common law exists only in "a 'few and restricted' instances", to fill gaps in federal statutory law, and since Congress has now addressed the standard of care issue in Section 1821(k), any federal common law in this area that may have existed prior to the passage of FIRREA necessarily "disappears." *City of Milwaukee*, 451 U.S. at 314. The Third Circuit's decision to the contrary is directly in conflict with the established precedent of this Court, and should therefore be reviewed and reversed.

III

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF ALL FOUR CIRCUIT COURTS OF APPEALS THAT HAVE PREVIOUSLY ADDRESSED THIS ISSUE

Prior to the Third Circuit's decision in this case, the courts of appeals for four other circuits had addressed the issue of the preemptive effect of Section 1821(k) on federal common law. *See Resolution Trust Corp. v. Frates*, 52 F.3d 295 (10th Cir. 1995); *FDIC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993). Each of those courts held that Section 1821(k) supplants federal common law and provides the exclusive source of law in civil actions for money damages against officers and directors of federally chartered depository institutions.

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receivership. 57 F.3d at 1246-47, A-31-32. Indeed, post-FIRREA' a federal court charged with determining the "federal common law" standard of liability for officers and directors of a federally chartered financial institution (whether or not in receivership) would be duty-bound to choose gross negligence, since Congress has made clear, in Section 1821(k), that this is its preference in actions involving all "insured depository institutions." *See Wallis v. Pan American Petrol. Corp.*, 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law.").

Frates, 52 F.3d at 297; *Bates*, 42 F.3d at 373; *Miramon*, 22 F.3d at 1364; *Gallagher*, 10 F.3d at 424.

The courts of appeals for the Fifth, Sixth, Seventh and Tenth Circuits began their analyses by noting the extremely limited role played by federal common law, especially in areas where Congress has already legislated, such as bank officer and director liability. *Frates*, 52 F.3d at 297; *Bates*, 42 F.3d at 370-71; *Miramon*, 22 F.3d at 1360; *Gallagher*, 10 F.3d at 424-25. Relying on the established precedent of this Court discussed in Point II, *supra*, these circuit courts noted that when, as here, Congress "speaks directly" to an issue, any federal common law relating to that issue is supplanted. *Frates*, 52 F.3d at 297 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)); *Bates*, 42 F.3d at 371 (citing *City of Milwaukee* and *United States v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 1631, 1634 (1993)); *Miramon*, 22 F.3d at 1360 (same); *Gallagher*, 10 F.3d at 424-25 (same).

Each of these four courts of appeals held conclusively that Section 1821(k) speaks directly to the issue of the standard of liability to which officers and directors of federally insured depository institutions will be held. Indeed, as the Court of Appeals for the Fifth Circuit stated: "It is difficult to conceive how Congress could more clearly 'speak directly' to the issue of the standard of care for personal liability of directors and officers of federally-insured depository institutions." *Miramon*, 22 F.3d at 1361.

The courts of appeals for the Fifth, Sixth, and Seventh Circuits then examined the so-called "savings" clause of Section 1821(k), which the RTC has argued (and the majority below agreed) preserves a federal common law cause of action against officers and directors of failed federally chartered institutions. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. Each court concluded that, based upon general principles of statutory interpretation, the savings clause could not possibly be construed as saving federal common law. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. *See also Frates*, 52 F.3d at 297 ("we

believe *Gallagher*, *Miramon*, and *Bates* have correctly resolved the [federal common law displacement] issue . . . and we see no reason to depart from or add to the analysis . . . .").

These courts concluded that if the savings clause was construed to preserve federal common law actions for simple negligence, then the language of the substantive sentence of Section 1821(k), which specifically enunciates a cause of action for gross negligence, would be rendered meaningless surplusage and a nullity. *Bates*, 42 F.3d at 372; *Miramon*, 22 F.3d at 1361-62; *Gallagher*, 10 F.3d at 420. Based on this analysis, the courts of appeals for these four circuits concluded that Section 1821(k) preempted any federal common law and established a gross negligence standard of care for officers and directors of failed federally chartered financial institutions.

Incredibly, however, the Third Circuit came to the conclusion that Section 1821(k) -- a *federal* statute which by its terms applies to *all* "insured depository institutions," a term whose definition includes *both* state and federally chartered institutions (*see* 12 U.S.C. § 1813(c)(2)) -- does not address the liability of directors and officers of *federally* chartered depository institutions *at all*. Instead, in an astonishing -- and entirely unsupportable (*see*, Point I, *supra*) -- act of mind-reading by the judiciary, the Third Circuit announced that, in enacting Section 1821(k), Congress intended only to preempt *state* statutes that set a higher threshold of liability than gross negligence (*i.e.*, the so-called state "insulating" statutes). The Third Circuit therefore determined that Section 1821(k) applies only to *state* chartered institutions, and that in cases involving federally chartered institutions, "federal common law" provides the exclusive source of law.

In so holding, the Third Circuit created a square and irreconcilable conflict amongst the circuits, which requires resolution by this Court.

IV

THE THIRD CIRCUIT'S DECISION IS SO CLEARLY ERRONEOUS, SO CLEARLY CONTRARY TO RECENT CONTROLLING SUPREME COURT PRECEDENT, AND OF SUCH POTENTIALLY WIDESPREAD SIGNIFICANCE THAT SUMMARY REVERSAL OF THE JUDGMENT BELOW IS APPROPRIATE

Supreme Court Rule 16.1 allows the Court to dispose of cases without full briefing and argument. That rule provides:

> After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

Summary disposition pursuant to Rule 16.1 has long been used by this Court in cases where a lower court has failed to follow clearly controlling precedent of this Court. *See, e.g.*, *Mireles v. Waco*, 502 U.S. 9 (1991); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Arthur v. Colorado*, 380 U.S. 250 (1965); *United States v. Haley*, 358 U.S. 644 (1959).

The present case is an appropriate one for such a disposition. As discussed in Point I, *supra*, the decision of the court of appeals is clearly at odds with the plain language of Section 1821(k) and violates well-established rules of statutory construction. In addition, as shown in Point II, *supra*, the court of appeals' determination to look to "federal common law" as the source of law in cases involving the liability of officers and directors of federally chartered depository institutions, when Congress has spoken directly to this issue in Section 1821(k), thoroughly ignores this Court's clear instructions on the creation and application of such judge-made law in *City of Milwaukee v. Illinois* and *O'Melveny & Myers v. FDIC*. The court of appeals' decision is also in conflict with the holdings of each of the other four circuit courts of appeals to address this issue, as shown in Point III, *supra*.

Ordinarily, these factors alone would be sufficient to warrant review by this Court. Here, however, such review -- and, we strongly urge, summary reversal -- is of particular importance because of the potentially widespread significance of the decision below, both in numerous pending and future cases, and to the depository institution industry as a whole. There are presently pending over one hundred cases brought by the RTC against directors and officers of failed depository institutions. *See* Resolution Trust Corp., Division of Legal Services, Professional Liability Section, *Semiannual Report, April 1, 1995 Through September 30, 1995*, (1995). A substantial portion of these involve federally chartered institutions, in which the interpretation of Section 1821(k) will likely be determinative. *Id.* While the RTC will cease to exist at the end of this year, the FDIC will assume responsibility for prosecuting these cases (*id.* at 2), and will also undoubtedly exercise its authority under FIRREA to bring cases in the future (as it has in the past) to recover damages from officers and directors of insured depository institutions. *Id.* The clear and irreconcilable conflict that has developed on the source-of-law issue between the Third Circuit, on the one hand, and the Fifth, Sixth, Seventh and Tenth Circuits, on the other hand, will surely cause confusion -- and disparate and inconsistent results -- in such present and future cases unless promptly resolved by this Court. Finally, experienced and careful businesspersons will be reluctant to serve as officers and directors of depository institutions in the climate of uncertainty created by the Third Circuit's decision, and such institutions will find it difficult to attract and retain the best qualified management in this environment. For all these reasons, summary disposition of this matter is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the Third Circuit's decision that Section 1821(k) does not supplant "federal common law" regarding the standard of liability for officers and directors of failed federally chartered financial institutions, and should summarily reverse that decision.

Respectfully submitted,

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December 12, 1995

APPENDIX

Filed June 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; GEORGE E. MIKULA; JAMES P. MCTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No . 93-cv-01811)

Resolution Trust Corporation, in its capacity as Receiver for City Savings, F.S.B., Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B. BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

On Appeal From the United States District Court
For the District of New Jersey
D.C. Civ. Nos. 92-cv-05261, 93-cv-01811, 93-cv-02569

Argued: November 8, 1994

Before: BECKER, MANSMANN, and ALITO, *Circuit Judges.*

(Filed June 23, 1995)

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

In 1989, Congress enacted § 212(k) of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (codified at 12 U.S.C.A. § 1821(k) (1989)), which provides:

> *Liability of directors and officers.*—A director or officer of an insured depository institution *may* be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation . . . acting as conservator orreceiver of such institution . . . *for gross negligence*, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are deemed and determined under applicable State law. *Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.*

12 U.S.C.A. § 1821(k) (emphases added). These interlocutory appeals, brought pursuant to 28 U.S.C.A. § 1292(b) (1993), require us to address, with regard to this provision, two important questions of first impression in this circuit — whether Congress, by its enactment of § 1821(k), (1) preempted state law, and/or (2) displaced federal common law actions that impose liability against directors and officers of insolvent federally insured depository institutions for conduct less culpable than gross negligence (e.g. for ordinary negligence).

Section 1821(k) was passed by Congress in response to the enactment by various states, during the middle and late 1980s, of lenient director liability statutes that generally provided directors with protection from gross negligence claims by limiting the grounds for liability to instances of reckless, willful and wanton boardroom misconduct. This section of FIRREA permits the Resolution Trust Corporation ("RTC") to seek recovery for such directors' and officers' gross negligence, while preserving the RTC's rights under "other applicable law." The particular questions raised by these appeals relate to whether Congress intended its reference to "other applicable law" to include state law and federal common law.

The appeals arise from cases brought by the RTC in the district court for the District of New Jersey on behalf of two insolvent depository institutions — United Savings and Loan of Trenton, New Jersey ("United Savings") and City Federal Savings Bank ("City Federal") in Bedminster, New Jersey — against certain former directors, officers and employees of these institutions ("the defendants"). The RTC brought claims

under New Jersey law against former directors and officers of United Savings, a state chartered institution, (the "United Savings defendants") and federal common law claims against former directors and officers of City Federal, a federally chartered institution, (the "City Federal defendants").

In the United Savings action, the district court denied the defendants' motion for dismissal and summary judgment as to the RTC's state law claims, concluding that § 1821(k) did not preempt any available actions for negligence and breach of fiduciary duty under New Jersey law. In the City Federal action, the district court granted the defendants' motion to dismiss the RTC's federal common law claims, concluding that the enactment of § 1821(k) supplanted any available federal common law actions for negligence and breach of fiduciary duty.[1]

Courts of appeals that have considered these issues have concluded that § 1821(k) does not preempt state law,[2] but that it does displace federal common law.[3] We agree that this provision does not preempt any available state law negligence or fiduciary duty claims; however, we disagree with the conclusion that Congress intended by enactment of this statute to supplant the RTC's ability to bring such actions under federal common law. Accordingly, we will affirm the district court's

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[1] In referring to the supplanting or displacement of federal common law by federal statutory enactments, we refrain from the use of the term "preemption" so as to avoid any confusion with the alternative question of state law preemption and its various incidents, which is also addressed in this opinion. *See Milwaukee v. Illinois,* 451 U.S. 304, 317 n.9 101 S. Ct. 1784, 1792 n.9 (1981) (illustrating the confusion which can result when the term "preemption" is used to refer to the displacement of federal common law by federal statutory enactments).

[2] *See FDIC v. McSweeney,* 976 F.2d 532 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 2440 (1993); *FDIC v. Canfield* 967 F.2d 443 (10th Cir.) (en banc), *cert. dismissed,* 113 S. Ct. 516 (1992).

[3] *See RTC v. Frates,* 52 F.3d 295 (10th Cir. 1995); *FDIC v. Bates,* 42 F.3d 369 (6th Cir. 1994); *RTC v. Miramon,* 22 F.3d 1357 (5th Cir. 1994); *RTC v. Gallagher,* 10 F.3d 416 (7th Cir. 1993).

order in the United Savings action and reverse the court's order in the City Federal action.

I. *FACTS AND PROCEDURAL HISTORY*

The RTC, which has been appointed receiver of both United Savings and City Federal,[4] brought these actions on behalf of both insolvent institutions pursuant to 12 U.S.C.A. § 1821(d)(2)(A)(i) (1989), which provides that the RTC succeeds, upon its appointment as receiver, to all rights, titles, powers and privileges of such institutions, including claims arising out of the conduct of the institutions' directors and officers. *See O'Melveny & Myers v. FDIC,* __U.S.__, 114 S. Ct. 2048, 2054 (1994) (recognizing that upon its appointment as receiver, the RTC "obtain[ed] the rights 'of the insured depository institution' that existed prior to receivership" (quoting 12 U.S.C.A. § 1821(d)(2)(A)(i))).

A. *United Savings*

In the United Savings action, the RTC alleges that the defendants failed to discharge their duties and obligations properly as directors, officers and members of United Bank's lending committees in connection with their consideration, approval and subsequent oversight of at least ten large acquisition, development and construction loans made to various borrowers between 1984 and 1990. The RTC's complaint alleges breach of fiduciary duty and ordinary negligence under New Jersey law, as well as gross negligence under both New Jersey law and § 1821(k) in the approval of these loans, which allegedly resulted in a loss to United Savings of approximately $12.7 million.

In particular, the RTC alleges that the defendants violated their duty of care by: (1) not hiring experienced lending underwriters or managers; (2) failing to reduce underwriting

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[4] The Director of the Office of Thrift Supervision of the U.S. Treasury Department ("OTS") appointed the RTC as Receiver of both institutions, declaring City Federal insolvent on December 7, 1989 and United Savings insolvent on June 15, 1990.

guidelines to a written form; (3) approving large loans after closing had already taken place; (4) maintaining inadequate appraisal procedures (often relying on appraisals provided by the borrower); (5) failing to maintain adequate internal controls; (6) not returning funds during the construction phase of commercial properties pending issuance of final occupancy permits; and (7) generally operating United Savings in an unsafe and unsound manner. According to the RTC, the defendants continued these practices despite warnings by regulators, outside directors and accountants. The RTC does not allege, however, any self-dealing, conflict of interest, bad faith or fraud on the part of the defendants.

In response to the RTC's complaint, the defendants moved to dismiss, or in the alternative for summary judgment, as to all New Jersey law claims based on ordinary negligence or breach of fiduciary duty, arguing that § 1821(k) preempts the RTC's right to bring such claims. The district court entered an order denying defendants' motion and then granted the defendants' request to certify the court's order for interlocutory appeal pursuant to 28 U.S.C.A. §1292(b) (1993).[5] We granted the petition for leave to appeal.[6]

[5] While the question of federal common law preemption was also certified by the district court in the United Savings action, the RTC now concedes that, absent the application of § 1821(k), only state law governs cases involving the liability of directors and officers of state-chartered institutions such as United Savings, while federal law exclusively governs such cases when the institution is federally chartered, like City Federal. This concession flows from the RTC's recognition that the applicable law governing the liability of officers and directors for their stewardship of the corporation is the law of the jurisdiction of incorporation. *See RTC v. Chapman*, 29 F.3d 1120, 1122 (7th Cir. 1994) (reaching this conclusion under the "venerable choice-of-law principle known as the internal affairs doctrine").

[6] In denying the United Savings defendants' motion to dismiss all negligence and breach of fiduciary duty claims under New Jersey law, the district court also rejected the defendants' argument that the business judgment rule as applied by New Jersey courts precludes any claims against independent, disinterested directors in the absence of an allegation

(Footnote continued)

B. *City Federal*

In the City Federal action, the RTC alleged that the defendants failed to discharge their duties and obligations properly as directors and officers of City Federal in connection with their consideration, approval and subsequent oversight of several large acquisition, development and construction loans made to various borrowers during 1985 through 1989. The RTC's complaint alleges breach of fiduciary duty, negligence under federal common law, and gross negligence under both federal common law and § 1821(k) in the approval of these loans, which allegedly resulted in damages to City Federal of approximately $100 million. In particular, the RTC alleges that the defendants violated their duty of care by: (1) failing to obtain and verify necessary financial information from borrowers; (2) maintaining inadequate appraisal procedures; (3) consistently loaning funds based on excessively high

of self-dealing, conflict of interest, bad faith or fraud. While we certified this interesting and important issue for interlocutory appeal, we now conclude that it is not ripe for decision. *See Michota v. Anheuser-Busch, Inc.*, 755 F.2d 330, 336 (3d Cir. 1985) (declining to decide an issue certified as part of an interlocutory appeal pursuant to § 1292(b) and "remand[ing] it for resolution in the proper course of the remaining litigation"). Resolving this question at this stage of the litigation would require us to prescribe the scope of the protection provided by the business judgment rule to directors and officers under New Jersey case law without the benefit of greater factual development in this case. As the new *Restatement of Corporate Governance* recognizes, "[t]he application of duty of care standards is . . . [a] heavily *fact oriented*" analysis. PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 Cmt. (1994) (emphasis added) ("The application of duty of care standards is . . . shaped by evidence of what can reasonably be expected of directors and officers in the context of the functioning of the modern corporation."). Given the fact-intensive nature of the law in this area, we conclude that the preferable course is to permit the district court's order denying the United Savings defendants' motion for summary judgment to stand so that greater factual development can occur. This course will allow the district court better to predict the scope of protection that the New Jersey Supreme Court would accord the defendants under the business judgment rule by providing the court with the opportunity to evaluate the defendants' conduct vis-a-vis New Jersey case law.

loan-to-value ratios that violated mandatory limits placed on such ratios; (4) making repeated imprudent long-range commitments to future lending or funding; (5) failing to monitor loan disbursements and the ongoing status of projects and loans; (6) improperly waiving risk limitations and other conditions contained in loan commitments to certain borrowers; (7) failing to require and verify that necessary permits and approvals were obtained before funding the loans; (8) improperly assessing the value of guarantees given as security for the loans; and (9) not requiring adherence to the Banks lending policies and procedures. In this action, the RTC does not allege any self-dealing, conflict of interest, bad-faith or fraud on the part of the defendants.

The City Federal defendants responded to the RTC's complaint by moving to dismiss all claims, other than gross negligence, arguing that § 1821(k) established an exclusive federal gross negligence standard of care for directors and officers of failed federally chartered financial institutions which supplanted any simple negligence claims available under federal common law. The district court agreed with the defendants' argument and accordingly granted their motion to dismiss the RTC's complaint to the extent that it alleged claims other than gross negligence. The district court granted the RTC's request to certify the court's order pursuant to 28 U.S.C. § 1292(b), and we granted the petition for leave to appeal.

II. *FINANCIAL INSTITUTIONS, REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989*

All parties agree that in enacting § 1821(k) Congress intended to preempt state laws which limit the liability of directors and officers to instances of conduct more culpable than gross negligence (i.e. intentional misconduct). At issue in these appeals is whether Congress, by its enactment of § 1821(k), also preempted state law or displaced federal common law actions that impose liability for conduct less culpable than gross negligence (e.g. ordinary negligence). As we have stated, the question of the interpretation of § 1821(k) is one of first impression in this circuit. Our review of the

construction of federal statutes is plenary. *See Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389 (3d Cir. 1994).

A. *The Plain Meaning of the Statute*

"The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990) (internal quotation marks omitted).

The disposition of these appeals turns on the breadth of § 1821(k)'s last sentence, which has become known as the "savings clause." Congress provided that "[n]othing in this paragraph shall impair or affect ***any right*** of the Corporation under ***other applicable law***." 12 U.S.C.A. § 1821(k) (emphases supplied). The RTC contends that this sentence manifests congressional intent to preserve the RTC's ability to seek recovery from directors and officers under *all* "other applicable laws," including the less forgiving negligence and fiduciary duty standards of care under state law and federal common law. We agree.[7]

[7] We note that, in addition to focusing on the statute's saving clause, courts concluding that § 1821(k) did not preempt state laws which held directors and officers liable for conduct less culpable than gross negligence, have also gleaned the limited preemptive intent of Congress from its use of the word "may" as opposed to "may only" in the first sentence of the provision: "[a] director or officer . . . *may* be held personally liable for monetary damages . . . for gross negligence." In *Canfield*, for example, the court read "may" as a "permissive term" that "does not imply a limitation on the standards of officer and director liability," refusing to construe the first sentence of the section as saying that an officer or director *may only* be held personally liable for gross negligence." *Canfield*, 967 F.2d at 446 (citing *Rose v. Rose*, 481 U.S. 619, 626-27, 107 S. Ct. 2029, 2034 (1987), where the Court refused to read "may" as establishing anything but discretionary power). The Ninth Circuit in *McSweeney* agreed. *McSweeney*, 976 F.2d at 537 ("Had Congress intended this authorizing provision to limit the FDIC . . . it would have inserted the word 'only' in the sentence."). *But see Bates*, 42 F.3d at 371 (rejecting this reading as

(Footnote continued)

The defendants contend that, when Congress referred to "other applicable law" in § 1821(k), it intended to refer only to the RTC's ability to pursue regulatory actions under other sections of FIRREA, such as the RTC's rights under 12 U.S.C.A. § 1818(b)-(g) (West Supp. 1995) to seek removal of negligent directors and officers and to issue "cease and desist" orders in cases of simple negligence. But Congress could not have intended to restrict the RTC to such a limited and specific set of legal claims by a general reference in this provision to "other applicable law." When Congress limited its reference to the law of a particular jurisdiction in other sections of FIRREA, it did so with *specific* language. *See, e.g.*, 12 U.S.C.A. § 1821(c)(3)(B) (1993) ("powers imposed by *State law*" (emphasis added)); 12 U.S.C.A. § 1821(c)(4) (1993) ("notwithstanding any other provision of *Federal law, the law of any State, or the constitution of any State*" (emphasis added)). In particular, when Congress limited its reference to other portions of FIRREA itself, it also did so specifically. *See, e.g.*, 12 U.S.C.A. § 1821(e)(3)(C)(ii) (West Supp. 1995) ("except as otherwise specifically provided in *this section*" (emphasis added)). Given the specific nature of these references in other portions of FIRREA, we think that § 1821(k)'s reference to other applicable law plainly demonstrates an intent to refer to *all* other applicable law.

Such a reading of the statutory language is consistent with the Supreme Court's decision in *Patterson v. Shumate*, 504

placing "undue emphasis on the word 'may,' which does not modify the substance of the provision"); *Miramon*, 22 F.3d at 1361 (same); *Gallagher*, 10 F.3d at 420 (same).

We decline to rest our reading of the text of § 1821(k) primarily on the belief that Congress intended to demonstrate its limited preemptive intent through the use of the word "may" in the statute's first sentence. We do acknowledge, however, that such a construction is consistent with what we believe to be otherwise obvious from the statute's language and legislative history—Congress intended to permit the RTC to continue to seek recovery under laws that hold directors and officers to a more stringent standard of care.

U.S. 753, 112 S. Ct. 2242 (1992), where the Court read a reference to "applicable nonbankruptcy law" in 11 U.S.C.A. § 541(c)(2) to encompass "any relevant nonbankruptcy law, including federal law such as ERISA." *See also Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964) (reading the language "any other law" of 12 U.S.C. § 1464(d)(1) as authorizing federal regulators to enforce "common law fiduciary responsibilities . . . through appropriate court action"), *cert. denied* 380 U.S. 915 (1965).

Moreover, reading the savings clause to provide for a broad retention of existing rights is supported by its placement at the conclusion of the statutory provision. In *Abbott Lab. v. Gardner*, 387 U.S. 136, 145, 87 S. Ct. 1507, 1513-14 (1967), the Court affirmed that "it is difficult to think of a more appropriate place to put a *general saving clause* than where Congress placed it—*at the conclusion of the section* setting out a special procedure for use in certain specified instances." *Id.* (emphases added).

B. *The Legislative History*

Our reading of § 1821(k)'s language is supported by clear legislative history, which, in our view, manifests an effort to place a floor, not a ceiling, on the liability of directors and officers. *See Chapman*, 29 F.3d at 1126 (Posner, C.J., dissenting) ("The purpose of section 1821(k), as the timing of the statute's enactment and other features of its history make clear, was to place a floor under the liability of directors of savings and loan associations, which were falling like ninepins."). We necessarily begin our examination of § 1821(k)'s legislative history with an inspection of "the provisions of the whole law, and . . . its object and policy." *Dole v. United Steelworkers*, 494 U.S. 26, 35, 110 S. Ct. 929, 934 (1990).

Section 1821 (k) was enacted as part of FIRREA, a massive 371-page legislative package that had among its primary purposes, as evident in the opening provision of the statute, "strengthen[ing] the enforcement powers of Federal regulators of depository institutions" and "strengthen[ing] the *civil* sanctions and criminal penalties for defrauding or otherwise

damaging the depository institutions and their depositors." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989) (emphasis added) (reprinted in 12 U.S.C.A. § 1811 note (West Supp. II 1990)). An overriding purpose in enacting this legislation was to facilitate an effort to "seek out and punish those that have committed wrongdoing in the management of the failed institutions,"[8] not to protect such directors and officers from claims of ordinary negligence.

Section 1821(k), in particular, was, as we have already noted, a reaction to the enactment by various states, during the middle and late 1980s, of lenient director liability statutes which protected directors from gross negligence claims by limiting their liability to instances of reckless, willful and wanton boardroom misconduct.[9] States enacted these laws out of a policy concern that too stringent a standard of care would impede the ability of a corporation to attract and retain the most qualified individuals as corporate directors. This "race to the bottom"[10] among certain states was a reaction to the

[8] *Presidents News Conference on Savings Crisis and Nominees*, N.Y. Times, Feb. 7, 1989, at D8, col. 1 (statement of President Bush).

[9] *See, e.g.*, IND. Code ANN. §23-1-35-l(e)(2) (Burns 1994) (declaring that directors are not liable unless their conduct constitutes at least "willful misconduct or recklessness"); FLA. STAT. ANN.. § 607.0831 (West 1994) ("recklessness or an act or omission which was committed in bad faith or with malicious purpose"); OHIO REV. CODE ANN. § 1701.59(D) (Anderson 1994) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interest of the corporation"); *see also* 8 DEL. CODE ANN. § 102(b)(7) (West 1994) (permitting a company's stockholders to adopt provisions that would limit a director's liability to actions that are illegal, that constitute a breach of the separate duty of loyalty or that constitute intentional transgressions); ARIZ. REV. STAT. ANN. § 10-054(A)(9) (West 1994) (same); CAL CORP. CODE § 204(a)(10) (West 1995) (same).

[10] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (describing the process whereby states follow each other in enacting changes in their corporate law that provide greater protection to officers and directors as a "race to the bottom").

Delaware Supreme Court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), which held the directors of Trans Union Corporation liable for their ostensible gross negligence in approving a cash-out merger notwithstanding the absence of any allegations of fraud, bad-faith or self-dealing. The various states enacting these statutes rejected the result in *Van Gorkom* and sought to ensure that their domestic corporations could attract and retain qualified directors and officers by protecting them from claims of gross negligence.[11]

At the same time that states were extending protection from liability to corporate directors, the regulators of federally insured depository institutions were embarking on a concerted litigation campaign to recoup from allegedly corrupt and incompetent directors a portion of the billions of federal dollars lost in the bankruptcy of federally insured thrifts. The enactment of § 1821(k) represents an attempt to facilitate this litigation in the wake of the impediments posed by state statutes insulating directors and officers from liability for gross negligence. The debates over § 1821(k) in the Senate demonstrate this intent to facilitate the recovery effort.[12]

The original Senate provision, § 214(n) of the Act, would have allowed the RTC to sue directors and officers under "any

[11] *See generally* Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437 (1985); Harvey Gelb, *Director Due Care Liability: An Assessment of the New Statutes*, 61 TEMP. L. REV. 13 (1988).

[12] Section 1821(k) originated in the Senate; and, other than a technical change in the wording of the savings clause, no substantive debate or amendments to this provision occurred in the House or at Conference. The House replaced the Senate version of the Savings clause, which had referred to "any right, if any, of the [RTC] that may have existed immediately prior to the enactment of the FIRREA act," with the current version. The defendants in these actions, however, correctly do not attribute any substantive change in Congressional intent to the adoption of this amendment. *See McSweeney*, 976 F.2d at 541 n.9 ("We see nothing in this change to indicate an intent to expand the preemptive effect of this provision.').

cause of action available at common law, including, but not limited to, negligence . . . [and] breach of fiduciary duty." S. 774, 101st Cong., 1st Sess. § 214(n) (1989). During the Senate debate, this proposal was modified so as to scale back the *extent* of state law preemption by raising the floor on the liability of directors from "negligence" to "gross negligence."

The amendment resulted, in large part, from a concern expressed by Senator Sanford that the sweep of the original provision was too broad given the valid policy interest, expressed by states enacting legislation in response to the *Van Gorkom* decision, of attracting the best qualified individuals as directors. 135 CONG. REC. 7150-51 (Apr. 19, 1989). Senator Sanford expressed the case for the amendment as follows:

> The bill as drafted would have preempted numerous state laws which provided limited indemnification for directors and officers. These state laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. . . . The amendment which the managers have accepted modifies the bill to preempt state law only in a very limited capacity. . . . [Section 1821(k)] is not a wholesale preemption of longstanding principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors.

Id. Senator Riegle, the bill's floor manager, evinced agreement with these concerns, *see id.* at S4265, and introduced an amendment reducing the amount of preemption.

During its introduction, Senator Riegle again explained the purpose of the amendment:

> In recent years, many States have enacted legislation that protects directors or officers of companies from damage suits. These "insulating" statutes provide for various amounts of immunity to directors and officers. For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."
>
> The reported bill totally preempted state law in this area, with respect to suits brought by the FDIC against bank directors and officers. However, in light of the state law implications raised by this provision, the manager's amendment *scales back the scope of this preemption.*
>
> Under the managers' amendment, State law would be overruled *only* to the extent that it forbids the FDIC to bring suit based on "gross negligence" or an "intentional tort."

Id. at 7152-53 (Apr. 19, 1989) (emphases added). Senators Roth and Garn also expressed similar sentiments: the intent of this amendment was to limit, not expand, the preemptive scope of the provision. *See id.* at 7155.

The defendants, however, like the Seventh Circuit in *Gallagher,* 10 F.3d at 422-23, interpret the concerns motivating this amendment to demonstrate Congressional intent to adopt a national standard of gross negligence for actions brought by the RTC in the service of a *federal* policy of attracting qualified officers and directors to federally insured financial institutions.[13] We reject this "revisionism," since, as we have demonstrated, the evolution of § 1821(k) in the Senate does

[13] To support their position the defendants also incorrectly point to a statement made by Senator Heflin: "I think the language should be reviewed and, in my judgment, changed to ensure that financial institutions are able to attract strong and capable individuals as directors and officers." 135 CONG. REC. at 7137. As recognized by the Tenth Circuit in *Canfield,* 967 F.2d at 790, Senator Heflin's comments do not relate to § 1821(k), but rather involved a proposed change to 12 U.S.C.A. § 1818(i)(2) (Supp. 1995), which made it more difficult for the RTC to obtain civil penalties against directors and officers. *See* 135 CONG. REC. at 7138 ("I am merely recommending that due process and fairness dictate that clear standards should be included in assessment of civil penalties." (statement of Senator Heflin)).

not represent the adoption of a national standard of gross negligence over one of ordinary negligence, but rather reflects an effort to decrease the amount of state law preemption by raising the floor on the liability of directors and officers.

The limited sweep of § 1821(k) is also explicitly demonstrated in a final section-by-section report prepared by the Senate Banking Committee. This report is consistent with other contemporaneous legislative history, and it makes clear that § 1821(k) did not disturb any claims, available as a matter of state or federal law, that would hold directors and officers liable for conduct less culpable than gross negligence:

> This subsection does not prevent the FDIC from pursuing *claims under State law or other applicable Federal law,* if such law permits the officers or directors of a financial institution to be sued (1) for violating a *lower standard of care, such as simple negligence.*

135 CONG. REC. S6912 (daily ed. June 19, 1989) (emphases supplied).

The defendants would have us discount this report as post-enactment legislative history, even though it was available six weeks *before* both the Senate and the House enacted the final version of FIRREA into law. The defendants base their argument on the fact that the Senate Banking Committee did not publish this report until two months after the Senate passed an initial version of FIRREA, since the period of time between introduction and passage of the Senate's initial bill was so short. In support of this position, the defendants rely on *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 407, 107 S. Ct. 750, 761 (1987), where the Court refused to "attach substantial weight" to a statement placed in the congressional record by a sponsor of an act ten days after the law was passed. *See Gallagher,* 10 F.3d at 421-22. The Supreme Court's opinion in *Clarke* is distinguishable, however, given that the legislative history in *Clarke* involved a statement "placed in the Congressional Record 10 days after the *passage* of the . . .

Act." *Clarke,* 479 U.S. at 407, 107 S. Ct. at 761. In discounting the value of the statement at issue, the Court recognized that "*Congress* did not have [the statement] before it in *passing* the . . . Act." *Id.* In contrast, Congress (both Houses), in enacting § 1821(k), *did* have this report "before it" in passing the final version of FIRREA. Moreover, the legislative history in *Clarke* did not involve a report prepared by the congressional committee that originally considered the provision in question but rather involved a statement by a single congressman whom the Court considered not to be an "impartial interpreter of the bill." *Id.*

To support their reading of § 1821(k)'s legislative history, the defendants rely on a portion of FIRREA's Conference Report, which provides:

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers and directors of an insured depository institution. The preemption *allows* the FDIC to *pursue claims* for gross negligence or any conduct that demonstrates a *greater disregard of a duty of care,* including intentional tortious conduct.

H.R. REP. No. 222, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 432, 437 (emphases supplied). We do not believe that the Conference Report supports the defendants' position. While the report does acknowledge that § 1821(k) preempts State law, such an acknowledgment is entirely consistent with the statute's limited preemptive intent. Moreover, the second sentence of this portion of the Conference Report acknowledges that which is evident throughout the legislative history: § 1821(k) "allows" the RTC to pursue claims for gross negligence in states not permitting such claims, but does not "limit" it from pursuing claims for ordinary negligence, when available under applicable law. *See Canfield,* 967 F.2d at 448 n.6; *McSweeney,* 976 F.2d at 539.

We are also unpersuaded by the defendants' reliance on congressional attempts to preserve more explicitly the RTC's right to bring a claim for negligence under other applicable

state or federal law by seeking to amend § 1821(k) in years following its enactment.[14] It is settled law that post-enactment legislative history should be afforded little or no weight, especially in the face of contradictory contemporaneous legislative history. *See U.S. v. Texas,* __U.S.__ , __ n.4, 113 S. Ct. 1631, 1635 n.4 (1993) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." (internal quotation marks omitted)); *U.S. v. Knox*, 32 F.3d 733, 749 n.14 (3d Cir. 1994) ('[P]ost-enactment legislative history . . . should be given little, if any, weight because [it] do[es] not necessarily reflect the intent of the members of Congress who originally enacted the statutory language."), *cert. denied* 115 S. Ct. 897 (1995). As this court has stated, adopting the language of Justice Scalia,

> "Subsequent legislative history" —which presumably means the post-enactment history of a statutes consideration and enactment—is a contradiction in terms.... Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Id. (quoting *Sullivan v. Finkelstein,* 496 U.S. 617, 631-32, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part)).

In particular, courts should be hesitant to examine congressional attempts to amend ambiguous legislative provisions in an effort to determine the intent of a previous Congress in originally enacting the law. The fact that

[14] For example, Congressman Richard Baker of Louisiana proposed an amendment in October 1991, which provided:

> Paragraph (1) shall not be construed as impairing or affecting any right of the . . . [RTC] under any provision of applicable State or other federal law, including any provision of common law or any law establishing the personal liability of any director or officer of any insured depository institution under any standard pursuant to such law.

H.R 3435, 102d Cong., 1st Sess. § 228 (Comm. Markup Oct. 18, 1991).

Congress subsequently sought to clarify the limited preemptive intent of § 1821(k) in the face of conflicting judicial interpretations[15] is not surprising. Courts finding "retrospective" legislative intent in such proposed enactments could improperly draw inferences from unsuccessful Congressional attempts to clarify ambiguities which Congress did not perceive at the time of enactment. Such attempts simply do not shed light on the intent of the Congress that originally enacted the provision.

In sum, we conclude that the legislative history associated with FIRREA, and particularly § 1821(k), does not manifest Congressional intent to adopt a uniform gross negligence standard of care for directors and officers of bankrupt federally insured depository institutions. Rather, the legislative history reflects an effort to ensure that directors and officers of state-chartered institutions (whom Congress viewed as responsible for a portion of the significant amount of federal money lost in the insolvency of such institutions) not escape liability to the RTC under the shield of certain state laws that had effectively insulated them even from claims based on their grossly negligent or reckless conduct. The intent of Congress was to strengthen, not weaken, the RTC's hand in pursuit of directors and officers. Mindful of this intent, and of our reading of the statute's language, we now directly address, in turn, the particular questions whether Congress preempted state law, or supplanted federal common law claims brought by the RTC for negligence and breach of fiduciary duty.

[15] The dispute in the Courts of Appeals about the intended preemptive effect of § 1821(k) was preceded by similar disagreement among district courts considering these issues at the time Congress proposed the clarifying amendment. *Compare FDIC v. Canfield,* 763 F. Supp. 533 (D. Utah 1991) (concluding that § 1821(k) preempts state law), *rev'd* 967 F.2d 443 (10th Cir. 1992) (en banc); *FDIC v. Miller,* 781 F. Supp. 1271 (N.D. Ill. 1991) (concluding that § 1821(k) displaces federal common law) *with FDIC v. Isham,* 777 F. Supp. 828 (D. Colo. 1991) (concluding that § 1821(k) does *not* preempt state law), *and FDIC v. Haddad,* 778 F. Supp. 1559 (S.D. Fla. 1991) (same).

III. *STATE LAW PREEMPTION*

Pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S. Ct. 2476, 2481 (1991) (quoting *Gibbons v. Ogden,* 9 Wheat 1, 211 (1824)). Federal law preempts existing state law in either of two ways: (1) through evidence of congressional intent to supplant state authority in a particular area, as expressed either through the language of the statute, *see Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S. Ct. 1305, 1309-10 (1977), or implicitly through the enactment of a federal regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947); or (2) when federal law and state law actually conflict, such as when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

As we have stated, both a plain reading of § 1821(k) and an interpretation of its legislative history reflect a congressional effort to expand, not constrain, the RTC's ability to recover against directors and officers by enabling it to seek recovery in those states that had adopted laws insulating officers and directors from liability. Given this interpretation of the statute and its legislative history, we conclude that Congress intended to leave room for state law to supplement § 1821(k) by permitting recovery in instances of ordinary negligence. Moreover, we do not believe that state laws subjecting directors of federally insured depository institutions to a more stringent standard of care by permitting recovery in instances of negligence conflict in any way with the congressional enactment of § 1821(k). In fact, such state laws are consistent with the

expressed congressional purpose in enacting FIRREA of "*strengthen[ing]* the enforcement powers of Federal regulators of depository institutions" and "*strengthen[ing]* the civil sanctions . . . for . . . damaging the depository institutions and their depositors." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989) (emphases added) (reprinted in 12 U.S.C.A. § 1811 note (West Supp. II 1990)).

The two Courts of Appeals that have directly confronted this question also have reached this conclusion. In *Canfield* 967 F.2d at 443, the Tenth Circuit sitting *en banc* concluded that § 1821(k) did not preempt available state law claims that permit the RTC to recover in instances of conduct less culpable than gross negligence, and the Ninth Circuit in *McSweeney,* 976 F.2d at 532, relying on *Canfield,* reached an identical result. In addition to interpreting § 1821(k)'s language and legislative history in a manner similar to that expressed *supra,* these courts set forth several additional reasons in support of their conclusion, which we also find persuasive.

First, they rejected the contention that Congress was motivated in enacting § 1821(k) by a need for a national liability standard in view of the fact that the statute clearly calls for the application of *various* applicable state law definitions of gross negligence. 12 U.S.C.A. § 1821(k) ("as such terms are defined and determined under *applicable State law"); McSweeney,* 976 F.2d at 539; *Canfield,* 967 F.2d at 447. The *Canfield* court noted that, given the vast differences in the standards of gross negligence in the various states, *id.* ("'[T]here is . . . no generally accepted meaning [of gross negligence]'" (quoting W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34 at 212 (5th ed. 1984)), "the statute cannot possibly, even without the last sentence, create a national standard of liability." *Canfield,* 967 F.2d at 447. We agree that the congressional use of state law formulations of gross negligence further illustrates the limited preemptive intent of Congress in enacting § 1821(k). If Congress had been motivated by a need for uniformity in the law it would not have invoked the application of alternative state

definitions of gross negligence, but rather would have called for the application of a uniform federal standard.

In addition, the *Canfield* and *McSweeney* courts also based their result on a persuasive policy concern:

> [U]nder defendants' interpretation, consider the position of an officer or director of a troubled federally insured institution in a state allowing actions for negligence. Prior to failure, liability would attach for simple negligence. After failure, liability would only attach if the officer or director could be proven grossly negligent under the applicable state definition. As the institution struggles, therefore, section 1821(k) would create an incentive for the officers and directors to allow the bank to fail. It simply cannot be that FIRREA would indirectly encourage such behavior when it was designed in part, according to its stated purposes, "to curtail . . . activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds." FIRREA, Pub. L. No. 101-73, § 101(3), 103 Stat. 183, 187 (1989).

Canfield, 967 F.2d at 449; *see also McSweeney*, 976 F.2d at 540-41.

In response to this argument, the defendants correctly point out that if a director or officer purposely engages in conduct leading an institution into receivership, such actions would themselves constitute intentional conduct and indisputably result in liability under § 1821(k). *See also Canfield*, 967 F.2d at 450 n.5 (Brorby, J., dissenting). On balance, however, we find this rejoinder to the RTC's policy argument unpersuasive. Directors and officers of financial institutions are well advised of their potential liability under the law. (Indeed, the argument that too stringent a standard of care will discourage capable people from becoming or remaining as directors itself presumes a sophisticated level of knowledge on the part of such individuals.) For instance, they would undoubtedly be aware that federal receivership would insulate them from claims of negligence. Armed with this knowledge, directors

and officers of institutions chartered in states permitting such claims would have more of an incentive to engage in conduct, which the RTC could not necessarily prove rises to the level of intentional conduct or gross negligence, but which nonetheless placed the institution at greater risk of receivership.

In sum, we conclude that Congress did not intend to hinder the RTC by denying it an opportunity to recover for instances of director and officer negligence when shareholders of these institutions would have had a right under state law before receivership, to bring such an action on behalf of the corporation. Accordingly, we conclude § 1821(k) does not preempt the RTC's right to pursue a claim for conduct less culpable than gross negligence, if any are available under New Jersey law, against the United Savings defendants.

IV. *DISPLACEMENT OF FEDERAL COMMON LAW*

We next address whether, by its enactment of § 1821(k), Congress foreclosed the RTC's ability to bring a claim against officers or directors of federally chartered depository institutions under federal common law for conduct less culpable than gross negligence. The answer to the question of federal common law displacement turns on an interpretation of congressional intent. While it is unnecessary to find that Congress "had affirmatively proscribed the use of federal common law," in order to conclude that federal common law has been supplanted, *Milwaukee v. Illinois* 451 U.S. 304, 315, 101 S. Ct. 1784, 1791 (1981) (internal quotation mark omitted), "any terms of the statute explicitly preserving or preempting judge made law are of course controlling, as is clear evidence of Congressional intent to achieve such results." *In re Complaint of Oswego Barge Corp.*, 664 F.2d 327, 339 (2d Cir. 1981) ("In the absence of clearly expressed legislative intent, legislative history may provide useful guidance.").

Lacking statutory language or clear evidence of congressional intent, we must glean the intent of Congress by examining whether "the legislative scheme spoke directly" to the question previously addressed by federal common law, *Milwaukee v. Illinois*, 451 U.S. at 315, 101 S. Ct. at 1791

(internal quotation mark omitted), and assessing the "scope of the legislation." *Id.* at 314-15 n.8, 101 S. Ct. at 1791-92 n.8 (examining whether "the field has been made the subject of comprehensive legislation or authorized administrative standards.'" (quoting *Texas v. Pankey,* 441 F.2d 236, 241 (10th Cir. 1971)). In whole, our inquiry must discern the intent of Congress so as to resolve the question whether applying federal common law would constitute "filling a gap left by Congress' silence," which is proper, or involve "rewriting rules that Congress has affirmatively and specifically enacted," which is improper. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S. Ct. 2010, 2015 (1978).

We must begin our inquiry, as we have stated, by determining whether "any terms of the statute explicitly preserv[e] or preempt [] judge-made law." *Oswego Barge,* 664 F.2d at 339. In drafting § 1821(k), Congress provided such language, stating "[nothing in this paragraph shall impair or affect *any right* of the Corporation under *other applicable law.*" 12 U.S.C.A. § 1821(k) (emphases supplied). We read the plain meaning of this savings clause as preserving the RTC's right to proceed against directors and officers of federally-chartered institutions under federal common law. The defendants concede that before receivership City Federal ("the Corporation") had a right to bring an action against them under federal common law. Furthermore, they concede that upon receivership the RTC "obtain[ed] the rights of [City Federal,] the insured depository institution that existed prior to receivership." *O'Melveny & Myers,* 114 S. Ct. at 2054. Accordingly, we conclude the plain meaning of this provision — which, stated again, preserves *"any* right of the Corporation under *other applicable law"*—secures the RTC's ability to proceed against the defendants pursuant to City Federal's preexisting rights under federal common law. In so doing, we reject the City Federal defendants' reading of this provision's reference to "other applicable law" as one intended to invoke only the RTC's rights under other sections of FIRREA or State law. As we have demonstrated, when Congress intended to limit its reference to the law of a particular jurisdiction or to other

portions of FIRREA itself, it did so with the use of *specific* language. *See supra* pages 13-14.

Notwithstanding the plain meaning of § 1821(k)'s savings clause, the defendants contend that we must declare any available federal common law claims supplanted if Congress "spoke directly" to the question of the liability of directors and officers of insolvent depository institutions or "'occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,'" *Gallagher,* 10 F.3d at 424 (quoting *Milwaukee,* 451 U.S. at 317, 101 S. Ct. at 1792). We think that is not enough since, as we have stated, the answer to the question of federal common law displacement, like state law preemption, must turn, in the first instance, on an interpretation of congressional intent, looking to the text of the statute and then to its legislative history.

In support of their position, the defendants rely on the Supreme Court's decision in *Milwaukee v. Illinois, supra,* which concluded that the enactment of the 1972 Amendments to the Federal Water Pollution Control Act supplanted the federal common law claim for abatement of a nuisance caused by interstate water pollution. The Court did so after examining the scope of the legislation and whether it spoke directly to the question previously addressed by federal common law. We do not believe the Supreme Court's opinion in *Milwaukee* is inconsistent with our approach.

The Court in *Milwaukee* did not reach its conclusion that federal common law was supplanted until after first examining in detail the question whether "congressional intent to preserve the federal common-law remedy . . . is evident in . . . the statute." *See Milwaukee,* 451 U.S. at 327-31, 101 S. Ct. at 1797-1800. The Court concluded that no such congressional intent was present. *Id.* In contrast, the intent of Congress surrounding the adoption of § 1821(k), as evident by both the provision's plain meaning and its legislative history, explicitly preserves any federal remedy for conduct violating a lower standard of care, such as simple negligence. The

relevant Senate Report clearly states that "this subsection does not prevent the FDIC from pursuing claims under . . . other Federal law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence." 135 CONG. REC. S6912 (daily ed. June 19, 1989).

Moreover, we do not believe (1) that § 1821(k) "spoke directly" to the standard of care applicable to directors and officers of federally-chartered depository institutions or (2) that the scope of this legislation occupied the field. The defendants contend that in enacting § 1821(k) Congress "spoke directly" to the standard of care for directors and officers of federally chartered institutions previously governed by federal common law. We disagree. As we have demonstrated, in enacting § 1821(k) Congress sought to address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, so as to ensure that the RTC could recover when the applicable state law insulated directors and officers from actions for gross negligence. While portions of FIRREA were enacted to govern both state and federally chartered institutions, *see* 12 U.S.C.A. § 1813(a)-(c) (1989), § 1821(k) was simply *not* enacted to define the standard of care applicable to federally chartered institutions governed by federal common law.

Section 1821(k) calls for the application of the "*applicable* State law" formulation of gross negligence. To read this subsection as supplanting federal common law would be to create an additional (and serious) problem, because it is unclear which formulation of gross negligence the City Federal defendants would have us apply. *See* KEETON, *supra,* at 212 (there is "no generally accepted meaning" of gross negligence). In a case involving the liability of directors and officers of a federally chartered institution, such as City Federal, no state law standard is "applicable," since *federal* law governs the liability of such individuals. *See Chapman,* 29 F.3d at 1122. If Congress had intended to speak directly to the question of what standard should apply when the depository institution is federally chartered, it would, in our view, have

addressed the question of which formulation of gross negligence should apply in such instances. The absence of such direction and the provision's reference to "applicable State law" reinforces our conclusion that Congress did not intend to address the liability standards applicable to directors and officers of federally chartered institutions in enacting § 1821(k), but rather enacted the provision for the purpose of preempting state insulating statutes.

In addition, we find it inconceivable that Congress intended to displace existing federal common law which already provided an action for conduct less culpable than gross negligence *only* in instances when an institution enters receivership. If Congress had intended to codify a federal standard of liability for directors and officers of federally chartered institutions, it would not have limited its application to circumstances where the institution entered receivership. Such an approach would, if the federal common law standard is one of ordinary negligence, create the anomalous situation of providing greater protection from liability to directors and officers when their institutions go insolvent, since before receivership directors and officers would be subject to derivative claims for ordinary negligence by the "Corporation," while after receivership such claims would be limited to gross negligence.

This scenario would create a perverse incentive for the directors and officers who manage our nation's federally chartered institutions to decrease their risk of liability by leading their institutions into receivership. *See supra* at 24-26. Congress could not have intended to create such an incentive in enacting a statute intended to "strengthen the enforcement powers of Federal regulators." Pub. L. No. 101-73, § 101(10), 103 Stat. 183, 187 (1989). Even assuming that the proper characterization of preexisting federal common law standard (as one of negligence or gross negligence) is unclear, it seems quite unlikely that Congress would have intended to reformulate the

post-receivership standard as gross-negligence, while leaving the pre-receivership standard in a state of ambiguity.[16]

[16] Given our conclusion that §1821(k) does not address the liability of directors and officers of federally chartered institutions, we need not discern whether the federal common law standard is one of ordinary or gross negligence. The district court should simply permit the RTC to proceed against the City Federal defendants under existing federal common law. We note that the Supreme Court first articulated a common law standard of care for directors and officers of federally chartered depository institutions over 100 years ago in *Briggs v. Spaulding* 141 U.S. 132 11 S. Ct. 924 (1891):

> The degree of care required depends upon the subject to which it is to be applied and each case has to be determined in view of all the circumstances....[T]he duties imposed are presumed to call for nothing more than ordinary care and attention.... If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.... In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances. . . .

Id. at 148, 11 S. Ct. at 929.

We recognize that *Briggs* arose before *Erie RR. v. Tompkins*, 304 U.S. 64 (1938), and hence, while addressing the liability of directors and officers of a nationally chartered bank, it did not label the articulated standard as one of federal common law. Moreover, in light of the dramatic changes to have occurred to the legal and economic environment confronted by federally-chartered depository institutions, the Supreme Court might choose to reexamine and/or refine the *Briggs* articulation of the common law standard of liability for directors and officers of such institutions.

Nevertheless, over a century later, the *Briggs* articulation of the standard of care apparently continues to apply as a matter of federal common law. For instance, in *FDIC v. Appling*, 992 F.2d 1109, 1113-14 (10th Cir. 1993), the Tenth Circuit described the standard of care for directors and officers of a federally chartered bank "as requiring such care and diligence as an ordinarily prudent man would exercise with reference to the administration and management of such a moneyed institution." *See also*

(Footnote continued)

We also reject the defendants' contention that the federal common law was supplanted because of the scope of FIRREA. Relying on the opinion in *Milwaukee*, the defendants' seek to capitalize on the fact that FIRREA created several agencies, such as the RTC, to deal with the thrift crisis, and conferred upon these institutions expanded federal regulatory powers over the activities of the officers and directors of insured financial institutions. However, *Milwaukee* does not help the defendants' position. In examining the scope of the legislation there in question, the *Milwaukee* Court relied in significant part on a number of statements in the Act's legislative history which demonstrated "the establishment of . . . a self-consciously comprehensive program by Congress." *Milwaukee*, 451 U.S. at 319, 101 S. Ct. at 1793 ("The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" (quoting S. REP. No. 92-414 at 95)). The defendants In this action can point to nothing in the plain language of the statute or its legislative history to suggest that Congress, in enacting FIERREA, intended to establish a comprehensive legislative program to address the liability of directors and officers. Rather, as we have demonstrated, the congressional purpose in enacting FIRREA, and § 1821(k) in particular, was exactly the opposite.

As Senator Sanford recognized, this provision does not represent "a wholesale preemption of long-standing principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors." 135 CONG. REC. at 7151. Rather than intending exhaustively to enumerate the powers available to federal regulators, Congress sought only to strengthen the RTC's ability to recover against malfeasant directors and officers of our nation's thrifts

FDIC v. Bierman, 2 F.3d 1424, 1432 (7th Cir. 1993) ("Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.").

by supplementing the laws that already regulated the activity of directors and officers, such as the federal common law standard of care. We cannot conclude solely from the enactment of provisions meant to enhance the powers of federal regulators that Congress intended to occupy the field and supplant existing powers already available as a matter of federal common law. Rather, Congress explicitly preserved "any right" available "under other applicable law."

In sum, the intent of Congress in enacting § 1821(k) was not to insulate directors and officers of bankrupt federally insured depository institutions from federal common law liability for conduct less culpable than gross negligence. Rather, § 1821(k) reflects, as we have demonstrated, an effort to ensure that directors and officers could not escape liability to the RTC under the shield of certain state laws that had effectively insulated them from claims based on their grossly negligent or reckless conduct. To read any more into the enactment of § 1821(k) would, as Chief Judge Posner has recognized, "make traps of its words" and perniciously turn the statute on its head, since Congress intended this provision to strengthen, not weaken, the RTC's ability to recover for director and officer misconduct. *See Chapman,* 29 F.3d at 1126-27 (Posner, C.J., dissenting) ("What would otherwise be a more stringent standard, that of simple negligence, is diluted by interpretation of a statute intended to make the liability of such directors more stringent.").

We recognize that the two Courts of Appeals to have addressed both state law preemption and the displacement of federal common law by § 1821(k) would permit the RTC to pursue an action for negligence under state law, but not under federal common law. *See Frates,* 52 F.3d at 295 and *Canfield* 967 F.2d at 443 (10th Cir.); *Chapman,* 29 F.3d at 1122 and *Gallagher,* 10 F.3d at 416 (7th Cir.). These courts have justified such a distinction by the need for greater congressional intent to preempt state law as opposed to that necessary to displace federal common law, given the federalism concerns present when state law is preempted. *Gallagher,* 10 F.3d at 424 ("'Such concerns are not implicated in the same fashion

when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of clear and manifest purpose is not required.'" *(quoting Milwaukee,* 451 U.S. at 316, 101 S. Ct. at 1792); *see also Milwaukee,* 451 U.S. at 317, 101 S. Ct. at 1792 ("[T]he assumption [is] that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." (internal quotation mark omitted)).

We agree that this generalized reasoning can result, in certain instances, in a conclusion that a particular statutory enactment did not preempt state law, yet did displace federal common law. However, in our view, the distinction is not determinative here since the plain meaning of § 1821(k) and the clear legislative history surrounding its enactment, which demonstrates that this provision was not intended to apply to federally chartered institutions, sufficiently overcome the presumption favoring the displacement of federal common law.

In reaching the contrary conclusion that § 1821(k) displaced federal common law, the courts of appeals to have considered the question have relied, in significant part, on the argument that permitting the RTC to seek recovery for a director's negligence would render § 1821(k) meaningless. The Seventh Circuit in *Gallagher* stated that "[r]eading the 'savings clause' as preserving a federal common law standard of liability for less culpable conduct than gross negligence would render the substantive portion of § 1821(k) surplusage." *Gallagher.* 10 F.3d at 420 ("It is illogical that Congress intended in one sentence to establish a gross negligence standard of liability and in the next sentence to eviscerate that standard by allowing actions under federal common law for simple negligence."); *see also Bates,* 42 F.3d at 372 ("If the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated . . . is redundant, meaningless surplusage."); *Miramon,* 22 F.3d at 1361. Moreover, in articulating this "surplusage" argument, the Fifth Circuit in *Miramon* rhetorically inquired — "Why would the RTC ever bring an action under section 1821(k), where it would have to prove gross negligence, when

it could bring an action under the federal common law and only be required to prove simple negligence?" *Id.*

We are unpersuaded by this argument. Given the RTC's concession that it can only bring federal common law claims against directors and officers of federally chartered institutions and not against their state-chartered counterparts, the answer to the *Miramon* court's question is clear. Concluding that § 1821(k) does not displace federal common law does *not* render this provision "redundant, meaningless surplusage" because the RTC still needs § 1821(k) to bring actions for gross negligence against directors and officers of institutions chartered in states with statutes insulating them from such liability. More particularly, the RTC could *not* bring a federal common law claim of negligence against directors and officers of depository institutions chartered in states with statutes insulating them from liability claims of gross negligence (or worse), since, as the RTC concedes, state law governs the liability of these individuals in the instances where § 1821(k) does not apply. *See Chapman*, 29 F.3d at 1122 (holding that the applicable law governing the liability of officers and directors for their stewardship of the corporation is the law of the jurisdiction where the institution was incorporated or chartered). Accordingly, § 1821(k) is needed to ensure that the RTC is not constrained from seeking recovery for gross negligence in instances where a state insulating statute would apply.

As we have stated, allowing the RTC to bring such actions was *precisely* the purpose underlying the enactment of § 1821(k). When the defendants are directors of federally chartered institutions, such as City Federal, this purpose is not present and the statute simply has no relevance. Permitting the RTC to pursue an action under federal common law when the depository institution is federally chartered in no way renders the statute inoperative; rather such a conclusion merely appropriately limits § 1821(k) to its intended realm.

V. *CONCLUSION*

We hold that Congress did not preempt existing state law or supplant federal common law holding directors and officers liable for conduct less culpable than gross negligence.[17] Accordingly, we will affirm the district court's order in the United Savings action, permitting the RTC to pursue negligence and fiduciary duty claims, if any, under New Jersey law. In the City Federal action, we will reverse the district court's order and direct the court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law.

[17] As we have noted, in addition to bringing a claim under federal common law in the City Federal action, the RTC has also brought a claim of gross negligence under § 1821(k). Given our conclusion that Congress did not intend § 1821(k) to apply to federally-chartered depository institutions, the RTC *cannot* proceed under § 1821(k) in the City Federal action.

MANSMANN, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the majority's holding that section 1821(k) of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(k), does not preempt claims for simple negligence or breach of fiduciary duty that may be available to the RTC under state law. I respectfully dissent, however, from Part IV of the opinion, where the majority holds that section 1821(k) does not supplant the RTC's ability to bring such actions under federal common law. I find the majority's conclusion contrary to the statute's language and legislative history. I believe that section 1821(k) establishes a gross negligence standard of liability in suits brought by the RTC against the directors and officers of federally-chartered insured depository institutions, and accordingly would hold, as our sister courts of appeals in the Fifth, Sixth, Seventh and Tenth Circuits have held,[1] that the federal common law standard of simple negligence[2] must yield to section 1821(k)'s higher standard in such cases.

My analysis is guided throughout by the vastly different tests the Supreme Court has instructed us to use when deciding whether a federal statute supplants federal common law on the one hand, or preempts state law on the other. When considering state law preemption, "'we start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and

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[1] *RTC v. Frates*, ___ F.3d ___ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990]; *RTC v. Bates*, 42 F.3d 369 (6th Cir. 1994); *RTC v. Miramon*, 22 F.3d 1357 (5th Cir. 1994); *RTC v. Gallagher*, 10 F.3d 416 (7th Cir. 1993).

[2] The majority does not decide what standard of liability controls under the federal common law. Nevertheless, it strongly suggests in footnote 16 that it is one of ordinary (or simple) negligence and discusses the question before us as if the federal common law would permit the RTC to sue the directors and officers of failed federally chartered insured depository institutions for simple negligence.

manifest purpose of Congress'". *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (citations omitted). By contrast, when the question is whether federal statutory or federal common law governs, "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of law." *Id.* at 317 (footnote omitted). Federal common law is a "'necessary expedient'", resorted to in the absence of a federal statute and is "'subject to the paramount authority of Congress.'" *Id.* at 313-14 (citations omitted). Although a statute will not invade well established principles of common law unless a statutory purpose to the contrary is present, *United States v. Texas*, __ *U.S.* __, 113 S. Ct. 1631, 1634 (1993), when Congress "speak[s] directly" to the question addressed by the common law, federal common law is supplanted. *Id.*; *Milwaukee v. Illinois*, 451 U.S. at 315. Moreover, it is not necessary for Congress to "affirmatively proscribe" the federal common law rule in order to abrogate its application. *Id.*

I.

All questions of statutory interpretation start with the language of the statute itself, and "[a]bsent a clearly expressed legislative intent to the contrary, 'that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Section 1821(k) has two parts: a substantive provision and a savings clause. In the first sentence, section 1821(k) provides that [a] director or officer of an insured depository institution may be held personally liable in any civil action by[ ] . . . the [RTC] . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care . . . as such terms are defined and determined under applicable State law []; and in the second sentence, saves "any right of the [RTC] under other applicable law".[3] Under

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[3] Section 1821(k) provides in pertinent part:

(Footnote continued)

FIRREA, "the term 'insured depository institution' means *any* bank or savings association the deposits of which are insured by the [Federal Deposit Insurance] Corporation pursuant to this chapter." 12 U.S.C. § 1813(c)(2) (emphasis added). Thus, that Congress has spoken directly in section 1821 (k)'s substantive provision to the standard of liability for the directors and officers of all failed federally-insured depository institutions, including those with a federal charter is, I believe, not open to question.

I also do not share the majority's confidence in the clarity of the savings clause.[4] Beginning its analysis by inquiring whether any terms of section 1821(k) " 'explicitly preserv[e] or preempt[] judge-made law[]' ", the majority "read[s] the plain meaning of th[e] savings clause as preserving the RTC's right to proceed against directors and officers of federally-chartered institutions under federal common law." Majority Op. at 27. This interpretation of the savings clause, however, has been rejected by our sister courts as contrary to elementary canons of statutory construction. They have concluded

(k) Liability of directors and officers

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

12 U.S.C. § 1821(k).

[4] I could not discern the meaning of the savings clause without reference to section 1821(k)'s legislative history. In my view, the savings clause ensures that even though state insulating statutes are preempted, state law which imposes a higher standard than section 1821(k)'s gross negligence liability standard, holding directors and officers liable for simple negligence, remains available to the RTC. *See supra* pp. 9-10.

that if the savings clause were construed to preserve federal common law actions for simple negligence, then the language of the substantive sentence of section 1821(k) which specifically enunciates a cause of action for gross negligence would be meaningless surplusage and rendered a nullity. I agree. *RTC v. Bates,* 42 F.3d 369, 372 (6th Cir. 1994); *RTC v. Miramon,* 22 F.3d 1357, 1361-62 (5th Cir. 1994); *RTC* v. *Gallagher,* 10 F.3d 416, 420 (7th Cir. 1993). *See RTC v. Frates,* __ F.3d __ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990 at 4]. ("[W]e believe *Gallagher, Miramon,* and *Bates* have correctly resolved the [federal common law displacement] issue . . . and we see no reason to depart from or add to the analysis . . . . ").

To avoid this dilemma, the majority informs us that section 1821(k) does *not* address the liability of directors and officers of federally-chartered depository institutions in RTC actions and was enacted only to preempt state insulating statutes. I have difficulty comprehending how section 1821(k) can preserve the RTC's right to sue the directors and officers of federal financial institutions for simple negligence under federal common law, and at the same time, not address the liability of these individuals in RTC actions. The majority cannot have it both ways; either section 1821(k) addresses the issue or it does not.[5]

The majority's position that section 1821(k)'s "intended realm" is limited to state chartered depository institutions,

[5] I would also disagree with the view that the substantive sentence of section 1821(k) speaks only to RTC actions against the directors and officers of state institutions and the savings clause speaks to RTC actions against the directors and officers of both state and federal institutions. Neither the statute's language nor its legislative history indicates that Congress restricted the subject matter of section 1821(k)'s first sentence to state institutions, then expanded it to include state and federal institutions in the second. Further, if section 1821(k)'s substantive provision only concerns state insulating statutes, federal common law need not be "preserved". Finally, other applicable law in the savings clause cannot refer to federal common law if the substantive provision relates only to actions involving state institutions, because federal common law does not have a place in such actions.

Majority Op. at 35, flies in the face of FIRREA's applicable definitional provisions. As noted, section 1821(k) covers directors and officers of "insured depository institution[s]", an all-inclusive term as defined in 21 U.S.C. § 1813(c)(2). Subsections 1813(c)(4) and (5), on the other hand, distinguish between and define respectively "Federal depository institution[s]" and "State depository institution[s]".[6] If section 1821(k) was intended to apply only to state institutions, Congress would have referred in the statute to insured "State depository institution[s]". Indeed, when Congress sought to restrict the application of section 1821's subsections to state institutions, it did so explicitly by using the appropriate term. *E.g.*, 12 U.S.C. § 1821(c)(3)(A) ("Whenever the authority having supervision of any *insured State depository institution* . . . appoints a conservator . . . the Corporation may accept such appointment.") (emphasis added).

Moreover, the majority's position that section 1821(k)'s scope is limited to state institutions is premised on what I believe to be an erroneous interpretation of the statute. The majority states that since "gross negligence" does not have a "generally accepted meaning", Majority Op. at 29, had Congress intended to speak directly to the standard of liability for directors and officers of federally chartered institutions it would have clarified which formulation of gross negligence

[6] Subsections 1813(c)(4) and (5) provide:

> **(4) Federal depository institution**
>
> The term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.
>
> **(5) State depository institution**
>
> The term "State depository institution" means any State bank, any State savings association, and any insured branch which is not a Federal branch.

21 U.S.C. § 1813(c)(4), (5).

applies in such cases.[7] In addition, the majority concludes that a federal statutory gross negligence standard and section 1821(k)'s reference in the first sentence to "applicable State law" cannot co-exist. I do not find them mutually exclusive, and read the statute as directing the courts to define "gross negligence" in cases involving failed federal depository institutions by the state law that has the closest connection to the institution at issue. Congress has, at various times and in various contexts, enacted statutes which rely upon state laws of decision in an overall federal statutes scheme. *In re TMI Litigation Cases Consol. II*, 940 F.2d 832, 855 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).[8] Concepts of negligence fall squarely within the province of the state courts and the conduct that rises to the level of gross negligence may vary

[7] In making this point, the majority cites *FDIC v. McSweeny*, 976 F.2d 532, 539 (9th Cir. 1992), *cert. denied*, _ *U.S.* _, 113 S. Ct. 2440 (1993), and *FDIC v. Canfield*, 967 F.2d 443, 447 (10th Cir. 1992). In these cases, the courts concluded that section 1821(k) does not preempt state law claims for simple negligence, viewing the statute's reliance on state law for the definition of gross negligence as directly refuting the proposition that FIRREA establishes a uniform, national standard of gross negligence liability. *Id.*

Since its decision in *Canfield* the Court of Appeals for the Tenth Circuit has held that section 1821(k) supplants federal common law. *RTC v. Frates*, _ F.3d _ (10th Cir. 1995) [1995 U.S. App. LEXIS 7990].

[8] Examples of federal statutes that explicitly authorize the use of state law include: the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2014(hh) (the "substantive rules for decision" in public liability actions "shall be derived from" the law of the state in which the nuclear incident occurs); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (the law of the place where the act or omission occurred determines the liability of the United States); 16 U.S.C. § 457 (claims for death or personal injury within a federal enclave are governed by laws of the state); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(2)(A) (the civil and criminal laws of each adjacent state are the law of the United States regarding the Outer Continental Shells subsoil and seabed). At times, the use of state law in a federal scheme is a matter of congressional intent. *See, e.g.*, *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946) (Congress intended that state law define "real property" for tax purposes under the Reconstruction Finance Corporation Act.).

from place to place. Thus, a direction from Congress to look for guidance to the law of the locality in which a federally chartered depository institution is based represents a sensible and reasonable way to determine the parameters of the gross negligence liability standard in any given case.

I therefore read the plain meaning of section 1821(k) as "speaking directly" to the standard of liability applicable in suits brought by the RTC against the directors and officers of federally chartered insured depository institutions, and setting it at gross negligence.

II.

When I look for legislative history that contradicts section 1821(k)'s plain meaning as I see it, I find none; and in fact, I find legislative history showing that Congress had before it several competing concerns when enacting section 1821(k) which it resolved in favor of a gross negligence liability standard.

Congress was aware that a number of states had enacted legislation that shields directors and officers from liability except for reckless or willful breaches of duty in order to persuade capable individuals to accept corporate directorships. Finding an intentional tort standard of liability unacceptably high, Congress enacted section 1821(k) with at least the purpose in mind to preempt state insulating statutes. *RTC v. Miramon,* 22 F.3d 1357, 1363 n.9 (5th Cir. 1994). At the same time, however, Congress was not prepared to displace all state law. Thus, the evolution of section 1821(k) from preliminary to final form was toward less preemption, *FDIC v. McSweeny,* 976 F.2d 532, 540 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 2440 (1993), with Congress ultimately leaving it, through the savings clause, to each state to decide whether a simple negligence standard is appropriate within its own borders.[9]

[9] During the floor debate in the Senate on the managers' amendment to the Senate's original bill, Senator Riegle, the bill's sponsor, explained that the amended bill sought to limit the preemptive scope of section 1821(k) to state insulating statutes. *See* Majority Op. at 17-18.

While Congress sought to set a standard of liability in section 1821(k) that provided federal regulators with adequate enforcement power, Pub.L. No. 101-73, § 101(9)-(10), 103 Stat. 183, 187 (1989), it also understood the importance of attracting qualified persons to serve as officers and directors of financial institutions.[10] *RTC v. Gallagher,* 10 F.3d 416, 422 (7th Cir. 1993). Accordingly, the standard of liability to be included in the statute — simple or gross negligence—was a matter of debate. While the Senate's initial bill would have allowed the RTC to bring claims "for any cause of action

[10] The remarks of Senator Sanford during the floor debate on the managers' amendment indicate that Congress was concerned that financial institutions be able to attract competent management:

> Mr. President, I would like to thank the distinguished managers of the bill. Senator RIEGLE and Senator GARN, for including in the managers' amendment modifications to the bill regarding directors and officers liability insurance contracts, surety bond, and financial institution bond contracts, and provisions relating to State laws affecting the liability of officers and directors of financial institutions.
>
> I believe that these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions.

135 Cong.Rec. S4276-77 (daily ed. April 19, 1989).

During this same debate, Senator Heflin noted the need for changes in the Senate bill to "ensure that financial institutions are able to attract strong and capable individuals as directors and officers []", and Senator Riegle agreed. *Id.* at S4264-65. Although Senator Heflin's comments were made in connection with modifications to FIRREA's "standard for imposition of civil penalties" provision, now codified at 21 U.S.C. § 1818(i)(2), I, unlike the majority, believe that the Senator's statements further our understanding of section 1821(k). The Supreme Court has counseled that the true meaning of a single section of a statute . . . , however precise its language, cannot be ascertained if it be considered apart from related sections . . . .'" *Commissioner v. Engle,* 464 U.S. 206, 223 (1984), *quoting Helvering v. Morgan's, Inc.,* 293 U.S. 121, 126 (1934). *See also Richards v. United States,* 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act ....").

available at common law, including but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty ....", S.774, § 214(n), 101st Cong., 1st Sess. at 105-106 (calendar N. 45, April 13, 1989), its amended version removed, *inter alia*, all references to a simple negligence standard:

> [A director or officer of an insured financial institution may be held personally liable for gross negligence, or intentional conduct, as those terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the [FIRREA] Act.

135 Cong.Rec. S4452 (daily ed. April 19, 1989).[11]

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[11] The majority relies exclusively on the following Senate Report as demonstrative of Congress' intent to "explicitly preserve [] any federal remedy for conduct violating a lower standard of care, such as simple negligence []", Majority Op. at 28:

> [Section 1821(k)] enables the FDIC to pursue claims against directors or officers of insured financial institutions for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence) or for intentional tortious conduct. This right supersedes State law limitations that, if applicable, would bar or impede such claims. this subsection [] does not prevent the FDIC from pursuing claims under State law or under other applicable Federal Law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty ....

S.Rep. No. 19, 101st Cong., 1st Sess., 135 Cong.Rec. 6912 (daily ed. June 19, 1989).

If this were the only item of legislative history before us, I would find the majority's position more persuasive. When I consider the Report in context, however, I do not believe it supports the majority's position. The Report was prepared by the Senate Banking Committee that drafted the

(Footnote continued)

Commenting in favor of the amended bill, Senator Sanford unmistakenly articulated Congress' intent to establish a standard of liability of gross negligence in section 1821(k) and clarified that the standard Congress enacted for actions brought under the statute was not intended for other cases:

> While I fundamentally believe that issues of corporate governance and the standard of care to which corporate officers and directors should be held are matters of State law, not Fed[e]ral law, the preemption of State law permitted by this bill is limited solely to those institutions that have Federal deposit insurance and to those cases in which the directors of officers have committed intentional torts or acts of gross negligence. As such, the establishment of a federal standard of care is based on the overriding Federal interest in protecting the soundness of the Federal Deposit Insurance Corporation fund and is very limited in scope. It is not a wholesale preemption of longstanding principles of corporate governance, nor does it represent a major step in the direction of establishing Federal tort standards or Federal standards of care of corporate officers and directors.

Id. at S4264-65.[12]

Senate's original bill. Due to the press of time, it was not placed in the Congressional Record until two months after the Senate voted on and passed the amended bill. *Id.* at S6934. As noted, the original bill was modified substantially to delete references to simple negligence. I therefore question the Report's value. *RTE v. Miramon*, 22 F.3d 1357, 1362 (5th Cir. 1994) ("[E]xamination of all of the legislative history, and scrutiny of the sequence of events leading up to the bill's passage, calls into question the conclusion of th[e] report.").

[12] The majority also points to Senator Sanford's comments for support. While the Senator's comments certainly demonstrate that section 1821(k) was not intended to set a universal standard of director and officer liability, I do not believe they support the view that Congress did not address the standard of liability to be used in this RTC action.

(Footnote continued)

The House version of section 1821(k), passed after the Senate version, H.R. 1278, 101st Cong., 1st Sess., 135 Cong.Rec. H2602 (daily ed. June 15, 1989), and the version that was ultimately voted into law, preserved the Senate's removal of the simple negligence standard. *See* Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), *reprinted in* 1989 U.S.C.C.A.N. 86. The House-Senate Conference Report which represents the final statement of terms agreed upon by both Houses of Congress confirms that Congress decided upon a gross negligence standard for section 1821(k):

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.

H.R.Conf.Rep. No. 222, 101st Cong. 1st Sess. 393, 398 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 437.

Events which occurred after the statute's enactment also confirm that Congress established a standard of liability greater than simple negligence in section 1821(k). I recognize that post-enactment legislative history is not as weighty as legislative history that is contemporaneous with a statute's passage, but as the Supreme Court has instructed, I would "be remiss" to ignore it. *Cannon v. University of Chicago,* 441 U.S. 677, 687 n. 7 (1979). There were two unsuccessful

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Further, I believe the Senator's comments cast doubt on the majority's statement that "[e]ven assuming that the proper characterization of preexisting federal common law standard (as one of negligence or gross negligence) is unclear, it seems quite unlikely that Congress would have intended to reformulate the post-receivership standard as gross negligence, while leaving the pre-receivership standard in a state of ambiguity." Majority Op. at 30. It appears that when enacting section 1821(k), Congress did not focus on the duty of care that directors and officers of financial institutions may owe their shareholders or third parties in pre-receivership situations or on duties of care in other areas.

efforts to amend section 1821(k) to include a simple negligence standard of liability, one by the FDIC,[13] and the other by Congressman Baker of Louisiana.[14] *Gallagher,* 10 F.3d at 423. Only the presence of a gross negligence standard in section 1821(k) would have precipitated these attempts to reintroduce simple negligence as a standard in the statute. Further, had Congress preserved the federal common law standard in section 1821(k), as the majority contends, these amendments would not have been necessary.

Finally, the public policy consideration the majority raises regarding the "perverse incentive" that would be created if the pre-receivership liability standard is simple negligence and the post-receivership standard is higher, Majority Op. at 30, may be more imagined than real. I have no reason to believe that the directors and officers of federal depository institutions will allow their institutions to fail in order to take advantage of section 1821(k)'s gross negligence standard. If, however, the statute has this result, it flows from the statute as written, which is for Congress to correct. *FMC Corp. v. U.S. Dep't of Commerce,* 29 F.3d 833, 846 (3d Cir. 1994) (declining to amend CERCLA by "judicial fiat").

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[13] The FDIC amendment provided:

> Nothing in this subsection shall impair or affect any right of the [RTC] under other applicable State or Federal law, including a right to hold such director or officer personally liable for negligence.

Miramon, 27 F.3d at 1363 n.10.

[14] The Baker amendment provided:

> Paragraph (1) shall not be construed as impairing or affecting any right of the . . . [RTC] under any provision of applicable State or other Federal law, including any provision of common law or any law establishing the personal liability of any director or officer of an insured depository institution under any standard pursuant to such law.

H.R. 3435, 102nd Cong., 1st Sess. § 228 (Comm. Markup Oct. 18, 1991).

III.

In my judgment, the only reading of section 1821(k) consistent with its plain meaning and its legislative history is that the statute "speaks directly" to the standard of liability applicable to the directors and officers of state and federal federally-insured depository institutions in RTC actions. I must, therefore, conclude that the federal common law in this area is supplanted. *Milwaukee v. Illinois,* 451 U.S. 304, 313-16 (1984).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G ROESSNER; GEORGE E. MIKULA; JAMES P. MCTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No. 93-cv-01811)

Resolution Trust Corporation, in its capacity
as Receiver for City Savings, F.S.B.,
Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

On Appeal From the United States District Court
For the District of New Jersey
D.C. Civ. Nos. 92-cv-05261, 93-cv-01811, 93-cv-02569

Present: Becker, Mansmann, and Alito,

JUDGMENT

These causes came to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel November 8, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered in No. 92-CV-05261 and certified to this Court pursuant to 28 U.S.C. § 1292(b), be, and the same is hereby reversed and the cause is remanded with direction to permit the Resolution Trust Corporation to pursue any claims for

negligence or breach of fiduciary duty available as a matter of federal common law.

It is further ordered and adjudged the order of the said District Court entered in Nos. 92-CV-02569 and 93-CV-01811 and certified to this Court pursuant to 28 U.S.C. § 1292(b), be and the same is affirmed insofar as the Resolution Trust Corporation was permitted to pursue negligence and fiduciary duty claims, if any, under New Jersey law.

Costs taxed against the appellee in appeal No. 94-5307 and the appellant in appeal No. 93-5308. All of the above in accordance with the opinion of this Court.

ATTEST

/s/

Chief Deputy Clerk

Dated: June 23, 1995

Certified as a true copy and issued in lieu
of a formal mandate on September 22, 1995.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-5307

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B., and the RESOLUTION TRUST CORPORATION, in its corporate capacity

v.

CITYFED FINANCIAL CORP.; RICHARD E. SIMMONS; K. MICHAEL DEFREYTAS; JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; GEORGE E. MIKULA; JAMES P. McTERNAN; VICTOR A. PELSON; MARSHALL M. CRISER

(Trenton New Jersey District Civil No. 92-cv-05261)

RESOLUTION TRUST CORPORATION, in its capacity as receiver for CITY SAVINGS, F.S.B.

v.

JOHN W. ATHERTON, JR.; GORDON E. ALLEN; ALFRED J. HEDDEN; PETER R. KELLOGG; JOHN KEAN, JR.; GILBERT G. ROESSNER; JAMES P. MCTERNAN

(Trenton New Jersey District Civil No. 93-cv-01811)

Resolution Trust Corporation, in its capacity as Receiver for City Savings, F.S.B., Appellant in No. 94-5307

NO. 94-5308

RESOLUTION TRUST CORPORATION

v.

ALFRED J. SCHUSTER; THOMAS J. LYNAM; MARTIN R. SIEGEL; RICHARD P. PEARLMAN; JOAN C. MOONAN, individually and as Executrix of the Estate of Robert J. Moonan; EUGENE J. ELIAS; GEORGE HURLEY; WILLIAM B. BRICK; JAMES W. DWYER; HARRY H. JAEGER; JOHN R. HIPPLE; JOHN C. LAURICELLA; LOUIS A. IATAROLA

(New Jersey District Civ. No. 93-cv-02560)

Martin R. Siegel, and Joan C. Moonan, as Executrix of the Estate of Robert J. Moonan and individually, Appellants in No. 94-5308

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, UTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge Mansmann would grant rehearing in this case.

BY THE COURT:

/s/________________________

Circuit Judge

DATED: SEPT. 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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RTC, et al.,	:	
Plaintiffs,	:	No. CV92-5261
against -	:	402 East State Street Trenton, NJ 08608
ATHERTON, et al.,	:	November 15, 1993
Defendants.	:	

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TRANSCRIPT OF CIVIL HEARING
BEFORE HONORABLE GARRETT E. BROWN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For RTC:	Riker, Danzig, Scherer, Hyland & Perretti BY: GLEN CURVING, ESQUIRE BY: CHARLES WEISS, ESQUIRE Headquarters Plaza 1 Morristown, NJ 07962
For Atherton, Hedden and Rosner:	Kirkpatrick & Lockhart BY: RONALD STEVENS, ESQUIRE BY: BRUCE NIELSON, ESQUIRE BY: HUNT DUMONT, ESQUIRE 1800 M. Street, N.W. South Lobby, 9th Floor Washington, D.C. 20036

For Allen, Pelson and Kellogg:	Skadden, Arps, Slate, Meagher & Flom BY: DOUGLAS KRAUSE, ESQUIRE Saiber, Schlesinger, Satz, & Goldstein BY: BRUCE GOLDSTEIN, ESQUIRE
For John Kean:	Venable, Baetjer, Howard & Civiletti BY: WILLIAM COSTON, ESQUIRE BY: RONALD GLANCZ, ESQUIRE Orloff, Lowenbach, Stifelman & Siegel BY: LAURA VALENTI STUDWELL, ESQUIRE

* * *

THE COURT: The defendants move to dismiss the plaintiffs' first amended complaint under Rule 12b6 After a thorough review of the record, I am constrained to grant the defendants' motion to dismiss with respect to all issues raised in the first amended complaint except for the allegation of gross negligence.

Now as to the question of whether or not more specific pleading is required, based upon the federal rules, I am constrained to say that it is not -- while it might be desirable and while I'm sure prompt discovery and motion practice may cure any deficiencies from an over-broad complaint, I do not think that that portion of the defendants' motion can be granted.

Now in ruling I think I have to first summarize this litigation a little bit. The Resolution Trust Corporation, created by the Congress in FIRREA, the Financial Institution Reform

Recovery Enforcement Act of 1989, in its capacity as receiver for City Savings, F.S.B., a successor to -- City Federal Savings Bank, asserts a cause of action against its former City Federal directors, officers, employees, including Atherton, Allen, Kellogg, Pelson, Kean, Hedden, Rosner, Criser, McCullough and McDerney (phonetic spellings).

The RTC asserts that the defendants were negligent, grossly negligence, and breached their fiduciary duties when approving certain large commercial loans which ultimately contributed to the failure of City Federal.

The history of City Federal as alleged in the complaint has been discussed in prior opinions. Briefly summarized, City Federal, with its principal place of business in Bedminister, New Jersey, was originally organized in 1887 a New Jersey chartered mutual savings and loan association. In 1949, it acquired a federal savings and loan charter from Federal Home Loan Bank Board.

In June of 1980, City Federal converted to a federally chartered stock savings and loan association. In 1984, City Federal's corporate structure was reorganized to create a unitary savings and loan company known as CitiFed Financial Corporation which acquired the stock of City Federal, which became a wholly owned subsidiary of CitiFed and changed its charter to that of a federal savings bank and so operated until its closure in December 1989.

In 1983, City Federal acquired 98 percent of the outstanding stock of Home Federal Savings and Loan, Palm Beach Florida. Later that year the Florida bank was merged into City Federal and following the merger, City Federal became increasingly involved in the funding of large commercial real estate projects in Florida. Two of these loans, Grand Harbor Project and Woodfield Country Club Estates project resulted in losses exceeding 130 million dollars.

Moving on to December 7, 1989, the Office of Thrift Supervision declared City Federal insolvent or closed and placed into receivership. The RTC was appointed as receiver for City

Federal, succeeded to all rights, titles, powers, and privileges of City Federal, its Board of Directors, shareholders and depositors.

An then on December 8th of 1989, pursuant to purchase of the assumption agreement, a newly formed federal savings bank, City Savings Bank, F.S.B., purchased all of the RTC's rights, title, and interest and any claim, action or judgment against any of City Federal's' directors, officers, accountants attorneys or employees whose actions may have been related to the substantial losses incurred by City Federal. OTS placed City Federal -- or City Savings, rather, into conservatorship and appointed the RTC as conservator.

September 21, 1990, the OTS closed City Savings and appointed the RTC as receiver. On that day, pursuant to a purchase and assumption agreement, a newly formed federal savings bank, City Savings Bank, F.S.B., purchased all the RTC's rights, title, and interest in any action, claim, or judgment against the directors, officers, or accountants, attorneys or employees whose actions may have been related to the substantial losses incurred by City Federal. OTS thereafter placed City into conservatorship and appointed the RTC as conservator. January 11, 1991, OTS closed City and appointed the RTC as receiver.

So that's how we come to the present juncture, where the RTC brings this action against the directors, officers, and employees of City Federal who have moved, as I said, for an order dismissing the complaint pursuant to Rule 12b6.

In order to grant that motion, I would have to accept all well-pleaded allegations as true and view them in a light most favorable to the plaintiff and determine that the plaintiff is nonetheless not entitled to relief. The complaint can't be dismissed unless the plaintiff can prove no set of facts entitling him to relief. The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the complaint.

In setting forth a valid claim, a party is required only to plead a short, plain statement of the claim, showing the pleader is entitled to relief. That's Rule 8a, and that is the basis for the second prong of my ruling, that no greater specificity concerning the defendants is required. While one might desire it, Rule 8a does not require it.

Now from the abbreviated statement of facts that I just reviewed, which are set forth in greater detail in the first amended complaint, it's clear that City Federal was a federally chartered and federally insured savings and loan association since 1949. A federally chartered savings and loan association is entirely a creation of federal law. Numerous cases have held that federal law has preempted state law with respect to the internal operations of federally chartered savings and loan associations and indeed the RTC concedes that federal and not state law applies. See also *Mortonson versus First Federal Savings and Loan Association*, 79 FRD. 603, District of New Jersey, 1978; *Resolution Trust Corporation versus Hess*, 820 Fed. Sup. 1359, District of Utah, 1993. But it is clear and not argued to the contrary that federal law, not state law, governs the internal affairs of federal savings and loan associations, including director liability.

We move on to the next issue. What is the applicable federal law dealing with the liability of banking directors and officers? To do that, we have to consider 12 U.S. Code 1821K, a section of FIRREA. Parties disagree as to the scope and application of that section, which specifically contemplates the liability of bank directors and officers. It states in pertinent part:

"A director or officer of an insured depository institution may be held personally liable for monetary damages and any civil action by, or on behalf of, or at the request or direction of the RTC which action is prosecuted wholly or partially for benefit of the RTC acting as conservator or receiver of such institution for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care, then gross negligence, including intentional tortious

conduct as such terms are defined and determined under applicable state law. Nothing in this paragraph shall impair or affect the rights of the RTC under other applicable law."

Now with certain bracketed additions, that is the provision we're talking about. Now the RTC asserts that 1821K doesn't establish a national gross negligence standard of care for directors and officers or federally chartered financial institutions and argues that the last line of Section K, which is commonly referred to as a savings clause, preserves the RTC's right to sue directors and officers under ordinary state negligence law.

Defendants argue that 1821K does establish gross negligence as the exclusive standard of liability for director and officers of federally chartered savings institutions. I find the defendants' position persuasive.

There are three distinct interpretations of 1821K. Some courts have established that the section doesn't preempt either federal or state common law as the standard of liability for officers, directors. Some Courts have taken the view that it preempts both state and federal and some Courts have adopted a middle ground, ruling that 1821K preempts federal common law but not state law.

Now since we're dealing solely with federal common law, we really don't have to consider the questions of state common law, and in reaching our determination, I think that the *Gallagher* case cited by the defense, 1993, West Law, 157 672 7th Circuit, November 9, 1993, is a very persuasive one. I think that the analysis that is set forth is persuasive indeed as far as the *Canfield* and *McSweeney* cases cited by the plaintiff, Footnote 3 does indeed state: "Two circuits have considered the related issue of whether Section 1821K preempts state law. Both Courts have determined that it does," citing *Canfield* and *McSweeney*. "We hold there any reference," it says, "that 1821K does not preempt federal common law is mere dicta, based upon the holding," and I don't think that we need to rely on mere dicta where we have clear holding and, more importantly, the clear language of the statute here which supports the defendants' position.

In *FDIC versus Mince* (phonetic), 816 Fed. Sup. 1541, Southern District of Florida, 1993, the Court found that 1821K did indeed preempt federal common law. In *Mince*, the District Court stated that "The federal common law standard of simple negligence -- "which I would note parenthetically is not clear that federal common law beforehand was simple negligence, but I don't need to reach that issue since I can clearly find preemption here. But in *Mince*, the District Court said, "The federal common law standard of simple negligence is preempted by 1821K. Well conceding that reasonable minds may differ as to the construction of the statute, the finding of federal common law is preempted as required. The reading of the savings clause to include federal common law makes the rest of the statute a nullity.

Accordingly, the Court finds that federal common law is preempted and is not included in the other applicable law language found in the savings clause. Any other interpretation of the savings clause eviscerates the gross negligence standard completely. The Court refuses to interpret the savings clause as a way which destroys the meaning of the rest of the statute."

Going further, the Court said, "If Congress had intended to set a uniform national standard as to state law, it could have done so more clearly." We need not reach that here because we're not dealing with a preemption of state law, but I think it's persuasive that federal common law is clearly preempted.

In *RTC versus Farmer*, 823 Fed. Sup. 302 307, Eastern District of Pennsylvania, 1993, the Court again differentiated between federal and state chartered financial institutions and agreeing with the *Mince* rationale, held that prior federal common law was preempted and the Court did not reach the issue of whether state liability standards allowing a claim for simple negligence in a non-federally chartered bank were preempted. We don't need to reach that issue here either.

It's clear to this Court that 1821K preempts federal common law by establishing a federal gross negligence liability standard for banking directors and officers of federally

chartered banks. The section is clear and unambiguous on its face. If the Congress had desired a different result, it would have drafted the section accordingly.

Therefore, the RTC's state law negligence claims are withdrawn, according to the RTC, and the claims under federal common law, to the extent that they go to a lesser standard than gross negligence, are clearly preempted, and I will therefore grant the defendants' motions and require the plaintiff to re-plead within twenty days.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RESOLUTION TRUST CORPORATION, in its capacity as Receiver for CITY SAVINGS, F.S.B.,	:	Civ. No. 92-5261 (GEB)
Plaintiff,	:	**MEMORANDUM AND ORDER**
v.	:	
JOHN W. ATHERTON, JR.; et al.,	:	
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on plaintiff Resolution Trust Corporation's motion pursuant to 28 U.S.C. § 1292(b), to certify this Court's November 15, 1993 orders which granted defendants' motions to dismiss plaintiff's first amended complaint to the extent that the complaint asserted claims other than gross negligence. For the foregoing reasons, the Court will grant plaintiff's motion for certification.

I. BACKGROUND

This Court adequately set forth the factual background of this matter in the November 15, 1993 ruling from the bench. Accordingly, this Court finds no reason to reiterate the facts of this case.

II. DISCUSSION

On November 15, 1993, this Court adopted the reasoning set forth in *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416

(7th Cir. 1993), and held that the Financial Institutions Reform, Recovery and Enforcement Act "[section] 1821(k) preempts federal common law by establishing a federal gross negligence liability standard for banking directors and officers of federally chartered banks." *See* November 15, 1993 Hearing Transcript at 28-31. Relying on *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2240 (1993) and *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.)(en banc), *cert. dismissed*, 113 S. Ct. 516 (1992), plaintiff Resolution Trust Corporation asserts that section 1821(k) does not preempt federal common law by establishing a federal gross negligence standard. Accordingly, plaintiff moves, pursuant to 28 U.S.C. § 1292(b), to have this Court certify its November 15, 1993 orders so that plaintiff may seek an interlocutory appeal to the Third Circuit.

28 U.S.C. § 1292(b) provides that a district court judge may certify an order for interlocutory appeal only if the judge is "of the opinion that such order involves (1) a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* After reviewing the submissions of the parties and the November 15, 1993 transcript, this Court finds that the federal gross negligence liability standard is a controlling question of law as to which there is a substantial ground for difference of opinion. *Compare Resolution Trust Corp. v. Gallagher*, 10 F.3d 416 (7th Cir. 1993) with *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2240 (1993) and *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.)(en banc), *cert. dismissed*, 113 S. Ct. 516 (1992). Moreover, this Court determines that an immediate interlocutory appeal to the Third Circuit, which could potentially resolve this legal issue, would materially advance the present litigation. Accordingly, this Court will grant plaintiff's motion for certification pursuant to 28 U.S.C. § 1292(b).

III. CONCLUSION

For the foregoing reasons,

It is this 11th day of March, 1994,

ORDERED that defendant Resolution Trust Corporation's 28 U.S.C. § 1292(b) motion for certification of this Court's November 15, 1993 orders be and is hereby GRANTED.

/s/

GARRETT E. BROWN, JR., U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 5, 1994
B-107

No. 94-8015

RESOLUTION TRUST CORPORATION, Petitioner

v.

RICHARD E. SIMMONS, et al.

(N.J. (Trenton) D.C. Civil Nos. 92-cv-05261
& 93-cv-01811 (GEB))

Present: STAPLETON, COWEN and LEWIS, *Circuit Judge*.

Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b).

/s/

Anthony Infante 597-3137
Deputy Clerk

ORDER

The foregoing petition for permission to appeal is granted.

By the Court,

/s/

Circuit Judge

Dated: May 18, 1994